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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

E. I. DUPONT DE NEMOURS AND COMPANY, *et al.*,
Petitioners,

v.

RUSSELL E. TRAIN, AS ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

**BRIEF FOR NATURAL RESOURCES DEFENSE
COUNCIL, INC. AS AMICUS CURIAE**

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INTERESTS OF THE NATURAL RESOURCES
DEFENSE COUNCIL

The Natural-Resources Defense Council, Inc. ("NRDC")
—a national environmental organization with more than
22,000 members residing in all states and territories—
has as one of its principal objectives the protection and
preservation of our Nation's waters. NRDC, primarily
through its Project On Clean Water, has monitored

closely the implementation of the Federal Water Pollution Control Act Amendments of 1972 ("Act"), 33 U.S.C. §§ 1251 *et seq.*, since its enactment. The legal issues involved in this case involve interpretation of the requirements and interrelationships of key provisions of the Act, particularly Sections 301, 304(b), and 402, which establish the basic regulatory scheme for abating discharges of pollution from existing point sources such as pipes, outfalls, and conduits. The basic legal issue is whether the Administrator of the Environmental Protection Agency is authorized, pursuant to Sections 301 and 304(b) of the Act, to promulgate regulations which establish national, uniform, minimum effluent limitations for carefully defined subcategories of point sources.

NRDC's interests in the issues raised by this case are of long-standing. *See*, for example, *Natural Resources Defense Council v. Train*, 6 ERC 1033 (D.D.C. 1973), *aff'd in part and rev'd in part*, 166 U.S. App. D.C. 312, 510 F.2d 692 (1974). This decision was the first circuit court decision which provided a detailed interpretation of Sections 301, 304(b), and 402 of the Act. The District Court's decision established a schedule for promulgating the regulations required by Section 304(b) (1) (A).

Pursuant to this schedule, as subsequently modified, EPA promulgated the effluent limitations guidelines regulations in issue in this case. These and similar regulations have been challenged by numerous industry organizations in cases which were filed and consolidated in eight of the ten U.S. Courts of Appeals. NRDC has filed *amicus curiae* briefs, which in general support EPA's position, in substantially all these cases, including the captioned case. Seven of the Courts of Appeals have rendered decisions in these cases.¹ Six of the circuits

¹ CPC International Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975), and — F.2d —, 9 ERC — (8th Cir. 1976); American Meat Institute v. EPA, 526 F.2d 442 (7th Cir. 1975); American Iron &

have held that EPA has authority to promulgate the regulations in issue; only one has held to the contrary.² Although the six circuit courts have differed in their views of what the precise form and content of these effluent limitations guidelines should be, these circuits are unanimous in holding that the Administrator is authorized by the Act to promulgate regulations which prescribe national, uniform, minimum or base-level effluent limitations as long as there is provision for granting in individual cases variances from these national limitations.³

NRDC has a substantial interest in ensuring that the broad and far reaching clean water objectives of the Act are achieved. This Court's decision will provide an authoritative interpretation of EPA's powers and duties for regulating and minimizing the discharge of pollutants into our Nation's waters. Regarding the issues before this Court, NRDC believes that EPA has properly interpreted and implemented its regulatory authority under

Steel Institute v. EPA, 526 F.2d 1027 (3d Cir. 1975); E.I. duPont de Nemours & Co. v. Train, 528 F.2d 1136 (4th Cir. 1976) and — F.2d —, 8 ERC 1718 (4th Cir. 1976); FMC Corp. v. Train, — F.2d —, 8 ERC 1731 (4th Cir. 1976); Tanner's Council of America Inc. v. Train, — F.2d —, 8 ERC 1881 (4th Cir. 1976); Appalachian Power Co. v. Train, — F.2d —, 9 ERC 1033 (4th Cir. 1976); Hooker Chemicals & Plastics Corp. v. Train, — F.2d —, 8 ERC 1961 (2d Cir. 1976); Natural Resources Defense Council v. EPA, — F.2d —, 8 ERC 1988 (2d Cir. 1976); American Frozen Food Institute v. Train, — F.2d —, 8 ERC 1993 (D.C. Cir. 1976); American Paper Institute v. Train, — F.2d —, 9 ERC — (D.C. Cir. 1976); American Petroleum Institute v. Train, 526 F.2d 1343 (10th Cir. 1975) and — F.2d —, 9 ERC — (10th Cir. 1976).

² CPC International Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975) (this was the first decision rendered regarding the validity of EPA's Section 301/304 effluent limitations guidelines regulations.)

³ The Third Circuit held that EPA must also establish a range of effluent limitations guidelines in addition to a base level limitation. American Iron & Steel Institute v. EPA, 526 F.2d 1027 (3d Cir. 1975). *See* note 172 *infra*.

Sections 301, 304(b), and 402 of the Act. Moreover, as discussed in detail in this *amicus* brief, it is essential that this Court uphold EPA's authority if the clean water objectives of the Act are to be achieved. To do otherwise would substantially reduce the likelihood that discharges of pollutants to the Nation's waters from existing point sources will be significantly reduced, particularly within the time frame contemplated by Congress, would make implementation of the Act's requirements by those states with delegated responsibilities much more burdensome and difficult, and would adversely affect the public's interest in cleaning up our Nation's waters.

This *amicus* brief is being filed with the consent of the parties to this case. Copies of the written consents are filed herewith.

QUESTIONS PRESENTED

1. Whether the Administrator of the Environmental Protection Agency is authorized to establish by regulation national, uniform, minimum effluent limitations for carefully defined subcategories of point sources pursuant to Sections 301 and 304(b) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1311, 1314(b).

2. Whether the United States Court of Appeals has exclusive jurisdiction pursuant to Section 509 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1369, to review effluent limitations guidelines regulations promulgated by the Administrator of the Environmental Protection Agency pursuant to Sections 301 and 304(b) of the Act, 33 U.S.C. §§ 1311, 1314(b).

STATEMENT OF THE CASE⁴

A.

INTRODUCTION

The basic issue in this case is whether the Administrator of the Environmental Protection Agency (EPA) acted in accordance with the purposes and requirements of the Federal Water Pollution Control Act Amendments of 1972, (the "Act" or "FWPCA") by establishing national, uniform, minimum effluent limitations for carefully defined subcategories of industrial point sources pursuant to Sections 301 and 304(b) of the Act.⁵ As demonstrated in the discussion which follows, promulgation of such national, uniform effluent limitations regulations is completely consistent with the Act and is essential to achieving several of the Act's objectives.

In order to understand the conflicting statutory interpretations of EPA and the petitioners, and the implications of these interpretations for achievement of the Act's goals, it is necessary to summarize briefly the relationships of the basic statutory provisions involved in this case. Section 301(a) makes the discharge of any pollutant by any person unlawful except as allowed by permit.⁶ Permits, which are issued principally under

⁴ Amicus NRDC found that Petitioners' "Statement of the Case" was incomplete and that Petitioners' "Statement" failed properly to present the history, structure, and intended operation of the FWPCA. Since proper interpretation of key provisions of the Act is in issue, amicus NRDC considered it imperative to present a careful and comprehensive statement of the case regarding the statutory issues involved.

⁵ Public Law No. 92-500, Oct. 18, 1972, 86 Stat. 816, 33 U.S.C. §§ 1251 *et seq.*, 1311, 1314(b).

⁶ 33 U.S.C. § 1311(a); *see* detailed discussion at pages 15-16 *infra*.

Section 402,⁷ are issued only to those dischargers who comply with the requirements established by the Act.⁸ These requirements include the effluent limitations involved in this case.⁹ Effluent limitations for new point sources are defined and established by Section 306.¹⁰ For existing point sources, both industrial and municipal, effluent limitations are established by Section 301 as defined pursuant to Sections 304(b) and 304(d).¹¹ Permits may be issued by EPA or by those states whose permit programs have been approved by EPA¹² and which comply with the requirements of the Act, including the Section 301 and Section 306 effluent limitations.¹³

⁷ The requirements of Section 402 govern the issuance of permits for discharges of pollutants by point sources except to the extent that Section 404 (which governs, in part, the discharge of dredged and fill material into navigable waters) or Section 318 (which governs the discharge of pollutants associated with an approved aquaculture project) apply. 33 U.S.C. § 1342(a)(1).

⁸ 33 U.S.C. § 1342; see detailed discussion at pages 18-24 *infra*.

⁹ The phrase "effluent limitations" is used in this brief in referring to, *inter alia*, Section 301 effluent limitations and Section 306 standards of performance, a use which is consistent with the Act's definition of the term "effluent limitation." See Section 502(11), 33 U.S.C. § 1362(11). For existing point sources, the statutory phrase is "effluent limitations," 33 U.S.C. §§ 1311(b)(1)(A), (e). The requirements which such effluent limitations must meet are "best practicable control technology currently available" for mid-1977, and "best available technology economically achievable" for mid-1983. 33 U.S.C. §§ 1311(b)(1)(A), (b)(2)(A). For new point sources, the statutory phrase is "standard of performance," and the requirement is "best available demonstrated control technology," 33 U.S.C. § 1316(a)(1).

¹⁰ 33 U.S.C. § 1316.

¹¹ 33 U.S.C. §§ 1314(b), 1314(d), 1311(b)(1)(A); see detailed discussion at pages 14-19 *infra*.

¹² 33 U.S.C. § 1342(b); see detailed discussion at pages 18-19 *infra*.

¹³ 33 U.S.C. § 1342(b); see detailed discussion at pages 18-24 *infra*.

The regulations establishing Section 301 effluent limitations for classes and categories of industrial point sources are reviewable in the U.S. Court of Appeals pursuant to Section 509(b).¹⁴ Enforcement of individual permit conditions is by suit in a U.S. District Court pursuant to Sections 309¹⁵ or 505.¹⁶

At its heart this statutory scheme for abating industrial point source pollution is based on federally established effluent limitations which are applied and enforced by EPA or by the states pursuant to federal oversight and control.

Accordingly, in order to meet its obligations under the Act, EPA initiated rulemaking proceedings by which it developed and promulgated regulations establishing effluent limitations and guidelines, standards of performance, and pretreatment standards pursuant to Sections 301, 304(b) & (c), 306(b) & (c), and 307(c),¹⁷ for approximately 40 categories of industrial point sources. One of these categories is the inorganic chemicals manufacturing point source category involved in this proceeding (hereafter "inorganic chemicals category").

Petitioners contend that EPA is not authorized to establish by regulation national, uniform, minimum Section 301 effluent limitations. Instead, petitioners assert that effluent limitations for existing point sources can be established only in each individual permit proceeding,

¹⁴ 33 U.S.C. § 1369(b).

¹⁵ 33 U.S.C. § 1319 (enforcement by federal authorities); see detailed discussion at page 19 *infra*.

¹⁶ 33 U.S.C. § 1365 (enforcement by citizen suits); see detailed discussion at page 19 *infra*.

¹⁷ See "Advance Notice of Public Review Procedures," 38 Fed. Reg. 21202 (1973), App. 21-42, as well as pertinent *Federal Register* notices regarding the proceedings by which the contested regulations were developed and promulgated; 39 Fed. Reg. 9611 (1974), App. B; 39 Fed. Reg. 28174 (1973), App. 60-151.

Pet. Brief 6, 28, 49-61, of which there will be approximately 40,000.¹⁸

If petitioners' interpretation were to prevail, one of the basic objectives of the Act which Congress devised after a quarter century of ineffective federal water pollution control legislation would be defeated: creating national, uniform, point source effluent limitations which are to be made increasingly more stringent over time, to the end that "the discharge of pollutants into the navigable waters be eliminated by 1985."¹⁹ Petitioners' interpretation would require that the basic effluent limitations for regulating existing point source discharges be established on an *ad hoc*, individualized permit-by-permit basis, often by each of the 27 states which have had their permit programs approved. The practical result of petitioners' contention would be to render EPA's general rulemaking effort invalid—an effort which continued for almost eighteen months with extensive participation by petitioners,²⁰ which developed a large amount of complex technical data, and which produced careful analyses and conclusions performed by experts. Presumably, under petitioners' interpretation, the detailed body of data and analysis developed during EPA's rulemaking proceeding could be introduced into the record of each permit proceeding and the permit issuing authority would then be obligated in each case to consider and analyze this data before prescribing a numerical effluent limitation. In effect, petitioners' interpretation would revive many of the unsatisfactory aspects of prior

¹⁸ EPA, EPA ENFORCEMENT: A PROGRESS REPORT—DECEMBER 1974 TO DECEMBER 1975, at 91 (1976).

¹⁹ Section 101(a)(1), 33 U.S.C. § 1251(a)(1).

²⁰ See documents cited in note 17 *supra* which discuss the rule-making process. Petitioners' active participation in the rulemaking process is evident from the administrative record and is discussed in *Pet. Brief* 13-22.

federal water pollution control legislation which Congress found to be ineffective and inadequate,²¹ such as an individualized case-by-case approach for establishing pollutant discharge limitations.

Because petitioners' discussion of the statutory framework is inadequate and a proper understanding of the Act's structure is essential to proper resolution of this case, a detailed discussion of the Act's comprehensive, carefully integrated mandatory program for water pollution control is presented in Part B below. Then, in Part C, the rulemaking proceeding by which the contested regulations were developed and promulgated is briefly described.

B.

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

1. Background Of The Act

The Federal Water Pollution Control Act Amendments of 1972²² culminates 26 years of effort by the Congress "to bring to reality an effective properly funded program to restore and enhance the quality of our waters and to insure their future as a lasting national asset."²³ Congress recognized that a basic problem with prior legisla-

²¹ See, e.g., statement of Representative Vanik, quoted in note 28 *infra*.

²² 33 U.S.C. §§ 1251 *et seq.* (hereafter "Act" or "FWPCA").

²³ H.R. REP. NO. 92-911, 92d Cong., 2d Sess. 66 (1972); *Leg. Hist.* 753. The Senate Committee on Public Works published a detailed two-volume legislative history of the Act. It contains the Act, the President's veto message, excerpts from the Conference, Senate, and House Reports, and excerpts from Senate and House debates. SENATE COMMITTEE ON PUBLIC WORKS (LIBRARY OF CONGRESS), A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93d Cong., 1st Sess. (Jan. 1973) (Comm. Print) (2 vols.). Citations to this compilation of the legislative history will be: "*Leg. Hist.* ———."

tion was that national, uniform, mandatory water pollution control standards had not been established.²⁴ As a result, industries could shop among local jurisdictions for those which for reasons of economic development, local dependence on a dominant industry, or lack of concern for the effects of pollution would grant the industry permission to discharge substantial amounts of pollutants into the nation's waters, sometimes at rates exceeding those allowed by neighboring states and to the detriment of downstream states. As a result, Congress repeatedly emphasized in the legislative history the importance of establishing nationally uniform effluent limitations.²⁵

National uniformity was the first consideration which Senator Muskie, floor leader for the bill and principal author of the Act, laid before the Senate during its final debate on the bill:

"Senators will recall from the November debate on the Senate bill that there were three essential elements to it: Uniformity, finality, and enforceability. Without these elements a new law would not constitute any improvement on the old; we would not bring a conference agreement to the floor without them.

"As far as uniformity and finality are concerned, the conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve nationally uniform effluent limitations based on 'best practicable' technology no later than July 1, 1977. This does not mean that the Administrator cannot require compliance by an earlier date; it means that these limitations must be achieved no later than July 1, 1977, that they must

²⁴ See, e.g., the legislative history cited in notes 28 and 160 *infra* and the quotations from the legislative history at pages 10-11, 13, 17, 58-61 *infra*.

²⁵ *Id*

be uniform, and that they will be final upon the issuance of a permit under section 402 of the bill."²⁶

To achieve this "uniformity" objective, Congress established a series of national water pollution control requirements, the first of which is the 1977 effluent limitation requirement based on the "best practicable" control technology noted in the quotation. Congress then devised a comprehensive, carefully integrated water pollution control program which applied these uniform effluent limitations on an increasingly strict basis to dischargers. At the same time, Congress recognized that significant differences exist among dischargers and developed methods for accounting for these differences while applying the system of uniform limitations: EPA was instructed to develop the limitations for specific, carefully defined classes and categories of point sources which are similar in their control technology requirements.²⁷ Finally, Congress established a detailed enforcement system which is based upon and ensures compliance with nationally uniform effluent limitations. As will be seen, the keystone of this system is Section 301, and the proper interpretation of this section and of its relationship to other provisions of the Act, particularly Sections 304(b) and 402, is the basic legal issue in this case.

It is important to emphasize at the outset two factors which are critical to proper understanding of the portions of the Act involved in this case—both involve substantial shifts from the water pollution control approach of previous legislation; both involve more effective federal control. The first is Congress' determination to limit the discretion of those administering the Act. As Senator Randolph, Chairman of the Senate Committee on Public Works, stated:

²⁶ *Leg. Hist.* 162.

²⁷ See, e.g., Sections 301(b)(2)(A), 304(b)(1)(A), 33 U.S.C. §§ 1311(b)(2)(A), 1314(b)(1)(A).

"... I stress very strongly that Congress has become very specific on the steps it wants taken with regard to environmental protection. We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives for administrators to follow

"In the past, too many of our environmental laws have contained vague generalities. What we are attempting to do now is provide laws that can be administered with certainty and precision. I think that is what the American people expect that we do."²⁸

The second is Congress' determination to prescribe enforceable federal effluent limitations and other requirements. Perhaps the most important innovation of the 1972 Act is the adoption of technology-based, nationally uniform effluent limitations to control pollution from point sources²⁹ instead of sole reliance upon water quality standards. Congress found that the 1965 water quality standards program was "limited in its success"³⁰ and adopted "this substantial change [to technology-based effluent limitations] because of the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of a given stream qual-

²⁸ *Leg. Hist.* 1272 (Senate debate on passage of Senate bill). It is important to note that a principal motivating force for the 1972 Amendments was extreme dissatisfaction with the inadequacies of existing laws. For example, during House debate on the bill, Representative Vanik stated:

"Amendments and improvements in our water pollution control laws are desperately needed now, because, as I have just stated, conditions are getting worse, and second, the *present control efforts are administratively unworkable and philosophically faulty.*" *Leg. Hist.* 494 (emphasis added).

See also *Leg. Hist.* 99 (Statement of Representative Jones); S. REP. NO. 92-414, 92d Cong., 1st Sess. 4-7 (1971), *Leg. Hist.* 1422-25.

²⁹ See S. REP. NO. 92-414, note 28, *supra* at 7-8, *Leg. Hist.* 1425-26.

³⁰ S. REP. NO. 92-414, note 28, *supra* at 8, *Leg. Hist.* 1426.

ity."³¹ Congress determined that "precise effluent limitations" which would be "defendable in court"³² were necessary to cleaning up the nation's waters. Accordingly:

"Under this Act the basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement.

"The Committee recommends *the change to effluent limits as the best available mechanism to control water pollution.* With effluent limits, the Administrator can require the best control technology; he need not search for a precise link between pollution and water quality."³³

Congress also determined that effluent limitations must be uniform across the nation to prevent competitive disadvantage from occurring among existing industries and to prevent industries from "forum shopping" among the states.³⁴ Congress was quite concerned with the prob-

³¹ *Id.*

³² *Id.*

³³ *Id.* (emphasis added).

³⁴ Moreover, when national, uniform effluent limitation standards for new sources exist, different state effluent limitations for existing sources may still encourage industry to forum shop among the states for jurisdictions with weak water pollution control programs.

First, a "new source" exists only after "publication of proposed regulations prescribing a standard of performance . . . which will be applicable to such source" Section 306(a)(2), 33 U.S.C. § 1316(a)(2). Prior to such time, existing source effluent limitations apply to all industrial point sources, whether new or existing.

Second, the Act contemplates that EPA will develop Section 301 effluent limitations which provide essentially comprehensive coverage of industrial point sources, *Natural Resources Defense Council v. Train*, 510 F.2d 692, 710-11, 7 ERC 1209, 1221 (D.C. Cir. 1974). Section 306 does not mandate equally comprehensive coverage for new source effluent limitations regulations. Section 306(b)

lem of non-uniform national effluent limitations and the possibility of states attempting to attract industry by establishing less stringent requirements. Thus, during Senate debate on the Conference Report, Senator Muskie stated:

"[T]he conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve nationally uniform effluent limitations based on 'best practicable' technology [the Section 301(b)(1) standard] no later than July 1, 1977."³⁵

2. The Statutory Framework For Effluent Reduction

With this background in mind, we can turn to detailed analysis of the Act. The ultimate objective of the

(1)(A), 33 U.S.C. § 1316(b)(1)(A). Therefore, new point sources for a number of industries will probably never be subject to new source standards of performance and should be subject to Section 301 effluent limitations.

Third, industry could properly assume that a state that establishes (through individual permit proceedings) weak effluent limitations for existing sources is also more likely to avoid applying to new sources effluent limitations which are more stringent than the national standard and to grant such sources variances, if available, and is less likely to apply strictly to new sources applicable new source effluent limitations and to develop and implement a stringent enforcement program.

³⁵ *Leg. Hist.* 162. And in an analysis of the Act submitted to the Senate during final debate on the Conference Report, Senator Muskie stated:

"Except as provided in section 301(c) of the Act, the intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations."

Leg. Hist. 172. See *Leg. Hist.* 156, 170, 263, 304, 711. See also discussion at pages 9-11 *supra*, and 17, 56-61 *infra*.

Act is forcefully and explicitly stated: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."³⁶ A principal goal of the Act is "that the discharge of pollutants into the navigable waters be eliminated by 1985."³⁷ In order to reach this goal, Congress directed in Section 301 that all discharges are unlawful unless allowed by a permit issued pursuant to Section 402.³⁸ These permits require compliance with the Act's requirements which, relevant to this case, are the effluent limitations for existing point sources established under Section 301.³⁹ In Section 301 Congress required that "effluent limitations established pursuant to this section . . . shall be applied to all point sources"⁴⁰ so that, by July 1, 1977, the discharge of effluents from industrial polluters will be limited to the level attainable by applying the "best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b)(1)(A) of the Act."⁴¹ By July 1, 1983, a higher standard is to be met and the industrial effluent limitations require the application of the "best available technology economically achievable" as determined pursuant to Section 304(b)(2)(A).⁴² In essentially identical language for both the 1977 and 1983 standards, Section 304(b) directs the Administrator to publish regulations which shall identify "for classes and categories of

³⁶ Section 101(a), 33 U.S.C. § 1251(a).

³⁷ Section 101(a)(1), 33 U.S.C. § 1251(a)(1).

³⁸ *NRDC v. Quarles*, 396 F. Supp. 1393 (D.D.C. 1975), *appeal pending*, (D.C. Cir.); see also note 7 *supra*.

³⁹ Effluent limitations for new sources are established pursuant to Section 306. 33 U.S.C. § 1316. See discussion in notes 34 and 9 *supra*.

⁴⁰ Section 301(e), 33 U.S.C. § 1311(e).

⁴¹ Section 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A).

⁴² Section 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A).

point sources" the degree of effluent reduction attainable by application of the appropriate control technology.⁴³

This effluent limitation portion of the Act's water pollution control scheme is premised on regulating discharges at their sources by means of technological controls which can be applied to limit and eventually to eliminate the discharges. Since both polluting discharges and control technology vary widely from industry to industry and also within broad industrial categories,⁴⁴ Congress developed a method for accounting for these differences so that nationally uniform effluent limitations could be developed and applied. Congress required Section 301 effluent limitations to be based on specific, carefully defined classes and categories of point source dischargers as identified pursuant to Section 304(b).

For the 1977 standard EPA is required to determine the best practicable control technology currently available for each class and category of point sources.⁴⁵ In making this determination, EPA must take into account factors such as costs in relation to effluent reduction benefits, the age of the equipment and facilities involved, the industrial processes and the engineering aspects, the non-water quality environmental impacts, and such other factors as the Administrator deems appropriate.⁴⁶ A similar

⁴³ Section 304(b)(1)(A), (b)(2)(A), 33 U.S.C. §§ 1314(b)(1)(A), (b)(2)(A).

⁴⁴ Thus, the pollutants discharged by a dairy product processing firm differ markedly from those of an inorganic chemicals manufacturing firm, and the pollutants discharged by a firm within the hydrogen peroxide production subcategory differ from those of a firm within the chlorine and sodium or potassium hydroxide production subcategory of the inorganic chemicals manufacturing category. See 39 Fed. Reg. 9611 (1974), App. 46b-47b, 32b-33b.

⁴⁵ Section 304(b)(1)(A), 33 U.S.C. § 1314(b)(1)(A).

⁴⁶ Section 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B).

and parallel determination and analysis is to be undertaken in developing the standards for 1983.⁴⁷

"Uniformity" was a basic rationale for establishing Section 301 effluent limitations for specific classes and categories of point sources, as was emphasized by Senator Muskie, principal author of the Act, in discussing the changes to Section 304 which were made in Conference:

"The modification of subsection 304(b)(1) is intended to clarify what is meant by the term 'practicable.' The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction for any class or category of sources.

"The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or to determine the economic impact of controls on any individual plant in a single community."⁴⁸

The point is restated and emphasized in the Conference Report:

"The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination."⁴⁹

⁴⁷ Section 304(b)(2), 33 U.S.C. § 1314(b)(2).

⁴⁸ *Leg. Hist.* 170; see also pages 9-11, 12-14, and 57-61 for other quotations and citations to the legislative history.

⁴⁹ S. REP. No. 92-1236 (Conf. Rep.), 92d Cong., 1st Sess. 121 (1972), *Leg. Hist.* 304; See also note 48 *supra*.

It is this analysis of water pollution control technology by classes and categories of industrial point source dischargers that is required by Section 304(b) pursuant to which the Section 301 point source effluent limitations are defined. These Section 301 effluent limitations are the key requirements and the benchmark for the operation and enforcement of the effluent abatement program established by the Act. Senator Muskie, summarized this close relationship between Sections 301 and 304(b) in discussing the Conference Report:

"It is the intention that pursuant to subsection 301(b)(1)(A) and Section 304(b), the Administrator will interpret the term 'best practicable' when applied to various categories of industries as a basis for specifying clear and precise effluent limitations to be implemented by July 1, 1977."⁵⁰

The effluent limitations established pursuant to Section 301 are then applied to individual dischargers by means of the permit system established by Section 402 of the Act and designated the National Pollutant Discharge Elimination System ("NPDES").⁵¹ Under NPDES, the Administrator, or a state official pursuant to a federally approved state permit program,⁵² may issue

⁵⁰ *Leg. Hist.* 169.

⁵¹ The Section 402 permit program is another change of major importance from prior water pollution control legislation. It represents an extension and expansion of the permit program which had been developed by the Administration under the authority of the Refuse Act of 1899. 33 U.S.C. § 407. See H.R. REP. NO. 92-911, note 23 *supra*, at 125, *Leg. Hist.* 812. The point source effluent limitation standard-setting scheme and the permit program form one of the essential new pollution abatement methods established by the Act.

⁵² Assumption of authority by the states for issuing permits does not affect in any way the uniform, national character of the water pollution abatement scheme established by the Act. The State permit program must comply with requirements of Section 402, it must insure that all applicable requirements established by the

a permit for the discharge of a pollutant on the condition that the discharge will meet all applicable requirements of the Act including the technological control standards for existing sources under Section 301 or for new sources under Section 306.⁵³

Finally, the Act establishes two enforcement schemes for ensuring compliance with Section 301 effluent limitations. Enforcement by the federal Administrator is provided by Section 309 which requires the Administrator to take action if he finds any person to be in violation of either Section 301 or a permit condition or limitation established under Section 402.⁵⁴ Citizen enforcement is provided by Section 505 which allows citizens to bring suit against any person "who is alleged to be in violation of . . . an effluent standard or limitation under this Act" ⁵⁵ Section 505 explicitly defines "effluent standard or limitation" to include "an effluent limitation or other limitation under Section 301 or 302 of this Act." ⁵⁶ All of the enforcement provisions explicitly require compliance with effluent limitations established by Section 301 independent from compliance with Section 402 permit requirements.

Act, including Section 301 effluent limitations, are complied with, and it must be terminated if at any time after approval it fails to meet these requirements, among others. Section 402(b)-(f), 33 U.S.C. § 1342(b)-(f).

⁵³ Section 402, 33 U.S.C. § 1342. Other applicable requirements which permittees must meet are: Section 302 (water quality limitations); Section 307(a) (toxic discharge standards); Section 308 (inspection and monitoring requirements); and Section 403 (ocean discharge criteria) see 33 U.S.C. §§ 1312, 1317(a), 1318, 1343.

⁵⁴ Section 309, 33 U.S.C. § 1319.

⁵⁵ 33 U.S.C. § 1365(a)(1).

⁵⁶ 33 U.S.C. § 1365(f)(2).

3. The Permit System

Full understanding of the legislative scheme for abating industrial pollution requires careful analysis of the permit issuing process since it is at the core of the regulatory system and provides the basic method for applying national effluent limitations to individual dischargers. At the outset, it is important to emphasize two factors: (1) implementing the Section 301 effluent limitation scheme in individual permit proceedings is not a simple mechanical process of applying the appropriate Section 301 effluent limitation to a particular discharger;⁵⁷ (2) permits must require compliance with a large number of requirements other than Section 301 such as Sections 302, 306, 307, 308, and 403.⁵⁸ What follows is a brief discussion of a number of the responsibilities and functions that the permit issuing authority—state or federal—performs under the Section 402 permit program.

First, for many point sources no Section 301 effluent limitations will exist at the time when the permit authority must determine what effluent limitations shall be applied to a particular point source. This situation occurs, for example, when a state authority decides to issue a permit prior to promulgation of applicable Section 301 effluent limitations regulations or when no applicable Section 301 effluent limitations regulations will be promul-

⁵⁷ Petitioners allege that EPA's promulgation of national, uniform, minimum Section 301 effluent limitations would reduce "[s]tate authorities . . . to . . . mere scribes whose only task is to 'mechanically crank' EPA-promulgated national standards ('limitations') into permits." *Pet. Brief* 58. The discussion at pages 20-25 above demonstrates that petitioners' allegation is groundless. In fact, the national, uniform, minimum Section 301 effluent limitations assist state authorities in carrying out their FWPCA responsibilities.

⁵⁸ Section 402(b)(1)(A), (b)(2), 33 U.S.C. §§ 1342(b)(1)(A), (b)(2).

gated.⁵⁹ On the other hand, for a complex point source which discharges effluent from several different manufacturing processes, several Section 301 effluent limitations regulations will be applicable and effluent limitations for the point source must be derived from a weighted application of the regulations.

Second, application of Section 301 effluent limitations to a non-complex point source also requires the permit authority to make a number of factual determinations and to exercise professional judgment and expertise. The permitting authority must first determine which point source subcategory the applicant is in.⁶⁰ The authority must therefore determine the production process or processes used by the applicant, since, for example, different inorganic chemical production processes may be used to produce the same product and each process produces different quantities of pollutants for which the Section 301 effluent limitations differ.⁶¹ Then, since effluent limita-

⁵⁹ See, e.g., *Natural Resources Defense Council v. Train*, 510 F.2d 692, 710-11 (1974) where the Court noted that EPA might determine in a few limited instances that it was appropriate not to promulgate effluent limitations regulations for certain point source categories. The District Court in *Natural Resources Defense Council v. Train*, Civ. Dkt. No. 1609-73 (D.D.C.), has, at EPA's request, vacated its order with respect to ten point source categories. See Order, dtd. Mar. 19, 1975.

⁶⁰ The inorganic chemicals category is subcategorized into 22 separate product subcategories. 40 C.F.R. Part 415, 39 Fed. Reg. 9611 (1974), App. B.

⁶¹ For example, EPA states in the final regulations:

"In cases where two dissimilar processes are used to manufacture the same product, separate limitations have been established within the subcategory." 39 Fed. Reg. 9611 (1974), App. 5b.

See, e.g., the chlorine and sodium or potassium hydroxide production subcategory where different effluent limitations are established for the mercury cell process and for the diaphragm cell process. *Id.*, at App. 32b-33b.

tions are almost always expressed in measures of weight of pollutant per unit of production (which allows different amounts of discharge for different sized plants), the applicant's quantity of production must be determined.⁶²

Another example of the kinds of determinations that the permitting authority must make in applying Section 301 effluent limitations to particular point sources is provided by the effluent limitations for the petroleum refining point source category. Here the effluent limitations are expressed in measures of weight of pollutant per unit of feedstock. These base effluent limitations for each subcategory are then adjusted based upon the size of the facility (the amount of feedstock throughput) and the configuration of the facility (the different refining processes used to produce a product) that is seeking a permit.⁶³ These adjustment factors are set out in the petroleum refining point source category regulations. Application of these factors provides for establishing different effluent limitations for different plants.

The permit issuing authority has a number of other duties to perform. For example, the information necessary for establishing effluent limitations is sometimes claimed by a prospective permittee to be a trade secret. This information must then be obtained by the permitting agency under legal authority with appropriate guarantees of confidentiality.⁶⁴

The permitting authority must also establish a schedule of compliance which "means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limita-

⁶² *Id.*

⁶³ See, e.g., 40 C.F.R. §§ 419.12(a), (b), 419.22(a), (b), 40 Fed. Reg. 21939, 21949, 21950-51 (1975).

⁶⁴ See Section 308(b), 33 U.S.C. § 1318(b).

tion, other limitation, prohibition, or standard."⁶⁵ The importance of developing this schedule was underscored by Senator Muskie during final Senate debate on the Conference Report when he stressed that the July 1, 1977 compliance date established by Section 301 is the maximum time allowed; the Administrator is expected to achieve the Section 301 effluent limitation standards sooner if possible.⁶⁶ Determining the proper compliance

⁶⁵ Section 502(17), 33 U.S.C. § 1362(17):

"The term 'schedule of compliance' means a schedule of remedial measures including an enforceable sequence of actions or operations *leading to compliance with an effluent limitation, other limitation, prohibition, or standard.*" Section 502(17), 33 U.S.C. § 1362(17) (emphasis added).

"The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." Section 502(11), 33 U.S.C. § 1362(11).

It is relevant to note that the use of the terms "effluent limitation, other limitation, prohibition, or standard" in Section 502(17) as independent factors is consistent with the identical use of these terms in Sections 509(b)(1) and 505(f) to designate specific, independent bases for judicial review, which bases are separate from and in addition to grounds based on violations of a permit condition (Section 505(f)(6)) or based on the Administrator's action in issuing or denying a permit under Section 402 (Section 509(b)(1)(F)). This consistent use of these statutory terms in these provisions underscores that EPA's and Amicus NRDC's interpretation of the Act is correct—i.e., that Congress intended EPA to establish Section 301 effluent limitations by regulation which effluent limitations are independent from Section 402 permit requirements. See, in particular, pp. 35-46 *infra*.

⁶⁶ See quotation in text on page 10 *supra*, and the following:

"Phase II in the Senate bill was to have been implemented by January 1, 1981. The conferees agreed on a 6-year period rather than a 5-year period to move to this significant phase. But again because of the time in conference, the slippage in the Senate bill is no more than 18 months. What does that slippage mean? It does not mean that polluters will be discharged from their responsibility

schedule requires thorough knowledge of the applicant's industrial process and effluent and current information about the availability of relevant control technology. Other decisions required of the permitting authority include establishing appropriate monitoring and reporting requirements.⁶⁷

Thus, issuing a permit for an industrial point source discharge is not a simple, mechanical matter which can be performed by a mere "scrivener."⁶⁸ And the determinations set out here are only some of those required by Section 402.⁶⁹

In sum, national, uniform, minimum Section 301 effluent limitations for the inorganic chemicals industry, which provide for establishing limitations based on a number of factors including the different manufacturing processes utilized and the quantity of products produced, are essential to effective operation of the Section 402 permit system and to meeting the goals of the Act. Without these effluent limitations it would be extremely difficult for the permitting authority in any reasonable time to make the many determinations it is required to make in establishing permit conditions and to prescribe limitations "which shall require the application of the best practicable control technology currently available" Section 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A).

to comply with the law. It only means that the requirements set forth in this act will be achieved in some cases at a date which is somewhat later than originally intended by the Senate. The Administrator retains the authority to require the application of these controls at an earlier date, and it is intended that he will require their application at the soonest practicable time." *Leg. Hist.* 162-163.

⁶⁷ See Section 308, 33 U.S.C. § 1318.

⁶⁸ See note 57 *supra*.

⁶⁹ See Section 402, 33 U.S.C. § 1342.

The Act is founded on a logical pattern. Section 301 of the Act sets out the basic requirements for establishing effluent limitations which are defined or determined by the Administrator pursuant to Section 304(b). Section 304(b) specifies factors to be taken into account in establishing the limitations and provides for the development of data on which the Section 301 effluent limitations for carefully defined subcategories of industrial point sources are to rest. When the Section 301 effluent limitations are defined pursuant to Section 304(b) and applied pursuant to Section 301(e), the limitations provide a uniform national system of technological control which is reduced to concrete expression in a permit issued under Section 402. The Section 402 permits are enforced under Sections 309 and 505 by reference to the permit itself, to Section 301 effluent limitations, and to other restrictions imposed by the Act.

C.

THE RULEMAKING PROCESS⁷⁰

The regulations challenged by petitioners in this case, were adopted pursuant to Sections 301, 304(b) & (c),

⁷⁰ In their brief, petitioners suggest that Congress intended EPA to promulgate, possibly with slight changes, as Section 304(b) regulations under the FWPCA the "guidance" documents that EPA had developed during 1971 and 1972 under the Refuse Act Permit Program, which was based on Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407, and had been established by Executive Order 11574, 35 Fed. Reg. 19627 (Dec. 25, 1970). See *Pet. Brief* 26, 14-15, 36, 42, 44-49.

This suggestion is without merit. Section 13 of the Rivers and Harbors Act of 1899 does not mandate consideration and application of the specific, statutory effluent limitation factors set out in Section 304(b). Thus, by enacting Sections 301 and 304(b), Congress did not intend that EPA should simply "conver[t] . . . the Refuse Act Permit Program guidance documents into published guideline regulations" as petitioners contend. *Pet. Brief* 26. The rulemaking process developed and implemented by EPA after en-

306(b) & (c), and 307(c), and consist of effluent limitations and guidelines, standards of performance, and pretreatment standards. These regulations were developed pursuant to a single, detailed, lengthy rulemaking process which involved substantial participation by petitioners as well as other interested members of the public.

actment of the FWPCA in 1972 was designed specifically to meet the requirements of Sections 301 and 304(b).

In addition, Amicus American Petroleum Institute states that EPA's decision to promulgate the Section 301 effluent limitations in issue was made "on the basis of short-run expediency in the face of litigation by environmental groups designed to repeal 'meaningful local and state participation' and to resurrect the 'Federal dictatorship approach' rejected by Congress." Brief for Amicus Curiae American Petroleum Institute 13 (the only litigation cited and discussed by the Institute is *Natural Resources Defense Council v. Train*, 6 ERC 1033 (D.D.C. 1973), *aff'd in part and rev'd in part*, 510 F.2d 692 (D.C. Cir. 1974)). In *NRDC v. Train*, the Circuit Court held that the "District Court acted reasonably in using a publication schedule as a means of implementing its order" which was properly issued "to compel performance of a statutory duty that has been unreasonably delayed." *Id.* at 704. The Circuit Court noted that: "Requiring the courts to rely on mere exhortation . . . would undercut their ability to spur reticent defendants to render the performance to which the plaintiff and public are entitled." The authority to set enforceable deadlines both of an ultimate and an intermediate nature is an appropriate procedure for exercise of the court's equity powers to vindicate the public interest." *Id.*, at 705 (footnote omitted).

The American Petroleum Institute's statement regarding the purpose of NRDC's suit is patently false. And the assertion that NRDC's suit was a principal reason for a decision which Amicus American Petroleum Institute alleges EPA made "to discard Congress' flexible technology guidelines and to opt instead for rigid, single-number discharge standards . . ." is also erroneous. *Id.* 13-14. The discussion above of EPA's lengthy, detailed rulemaking process is more than adequate evidence to rebut Amicus American Petroleum Institute's assertion. Moreover, on August 8, 1973, prior to the time that NRDC filed its complaint and more than 3 months prior to the District Court's decision, EPA staff wrote a legal memorandum which discussed EPA's rulemaking approach for establishing uniform Section 301 effluent limitations. EPA, A COLLECTION OF LEGAL OPINIONS, 346-49 (Dec. 1970-Dec. 1973) (Vol. 1).

It is important to emphasize that on August 6, 1973, before EPA had published a single proposed effluent limitations guidelines regulation, it published an "Advance Notice of Public Review Procedures" which set out the specific steps of EPA's process for developing the regulations in issue.⁷¹ The purpose of the notice was to facilitate public comments on the regulations.⁷² The rulemaking process described in detail in the Advance Notice and followed with respect to the challenged regulations is summarized below.

First, EPA established the broad industrial categories for which it would develop effluent limitations, a list which was revised as EPA acquired more detailed knowledge of industrial processes, discharges, and control technology.⁷³ Currently, EPA expects to publish regulations for approximately 40 industrial categories.⁷⁴ EPA further analyzed each broad industrial category to determine whether separate limitations and standards were necessary for different segments within the category based on differences in raw materials, products, processes, age and size of equipment and facilities, waste water constituents, and other factors.⁷⁵ The regulations for the

⁷¹ 38 Fed. Reg. 21202 (1973), App. 21-42.

⁷² *Id.*

⁷³ The analysis which follows is based on knowledge acquired by NRDC's Project On Clean Water and by other NRDC staff members as well as on EPA public documents and other literature, such as newsletters. Much of this information was presented to the United States District Court for the District of Columbia in the case of *Natural Resources Defense Council v. Train*, 6 ERC 1033 (D.D.C. 1973), *aff'd in part and rev'd in part*, 510 F.2d 692 (D.C. Cir. 1974).

⁷⁴ See *Natural Resources Defense Council v. Train*, 6 ERC 1033 (D.D.C. 1973), as amended by subsequent orders; the orders in the case list these categories.

⁷⁵ See 38 Fed. Reg. 21202, 21203 (1973), App. 24.

inorganic chemicals category challenged here establish 22 subcategories within that industry.⁷⁶

Second, EPA conducted, generally by contract with independent consultants in cooperation with EPA personnel, extensive and detailed technical and economic analyses of selected categories and subcategories of point sources.⁷⁷ These contracts generally required submission to EPA of draft reports, which contained draft guidelines, in six months and final reports in eight months.⁷⁸

Third, EPA solicited comments on the draft contractors' reports from the affected industries as well as from other interested persons, such as the states and environmental organizations.⁷⁹ Generally, as in this case, the affected industries submitted extensive comments.⁸⁰

Fourth, based on the materials, data, and comments noted above, EPA issued proposed regulations and, at the same time or shortly thereafter, published a draft development document and an independent economic analysis analyzing a broad range of control technologies and pro-

⁷⁶ 39 Fed. Reg. 9611 (1974), App. B.

⁷⁷ See generally discussion in *Pet. Brief* 15-19, and in the preambles to the proposed and final regulations challenged herein, 38 Fed. Reg. 28174 (1973) App. 61, 39 Fed. Reg. 9611 (1974), App. B.

⁷⁸ *Id.*

⁷⁹ See 38 Fed. Reg. 28174 (1973), App. 82-83 (lists, *inter alia*, organizations from whom comments were solicited); EPA "Advance Notice of Public Review Procedures," 38 Fed. Reg. 21202-06 (1973) App. 21-42 ("[This] notice is divided into three parts. First, the basic legal authority for regulations concerning effluent limitations guidelines and standards of performance will be set forth. Second, EPA's general methodology will be described. Third, the means by which EPA has to date, and will in the future, seek the widest possible public scrutiny of the technical and legal basis for the regulations to be established will be explained." App. 22).

⁸⁰ See 38 Fed. Reg. 28174 (1973), App. 82-83.

viding the technical and economic basis for the proposed regulations.⁸¹

Fifth, EPA solicited additional public comments on the proposed regulations, often extending the public comment period in order to meet the requests of interested persons.⁸²

Finally, more than a year after initiating the process of developing regulations, EPA promulgated final regulations followed by publication of a final development document and economic analysis.⁸³

It is important to emphasize that the development documents and contractors' reports are formidable documents, generally consisting of several hundred pages,⁸⁴ and are an integral part of the rulemaking process. These documents contain detailed data and expert analysis which underlie and support the effluent limitations. Criticism of these documents during the rulemaking process results in reassessment, revision, and often additional research and analysis so that the final development documents provide adequate support for the regulations.⁸⁵

⁸¹ See, e.g., 38 Fed. Reg. 28174 (1973), App. 82; the Draft Development Document and Draft Economic Analysis are printed in the record, see App. 1, 43, 48.

⁸² See, e.g., 38 Fed. Reg. 28174 (1973), App. 82.

⁸³ See, e.g., 39 Fed. Reg. 9611 (1974), App. B. In addition, in some cases in response to comments on final regulations EPA proposed amendments, sought additional comments, and, if warranted, amended the regulations. This process occurred, for example, with respect to the petroleum refining point source category regulations. See 39 Fed. Reg. 37069 (1974), 40 Fed. Reg. 21939 (1975).

⁸⁴ See, e.g., App. 107, R. 1-451 (more than 450 pages); App. 48-59, R. 4455 (more than 350 pages).

⁸⁵ See, e.g., preamble to final regulations, 39 Fed. Reg. 9611 (1974), App. B. *Affidavit of Lillian D. Regelson*, Deputy Administrator, EPA, Aug. 12, 1974, submitted in *Natural Resources Defense Council v. Train*, Civ. Dkt. No. 1609-73 (L.D.C.).

The lengthy and detailed rulemaking process described above produced the regulations in issue in this case. The process involved the active participation of the petitioners.⁸⁶ In response to hundreds of pages of extensive comments and criticisms submitted by petitioners, EPA provided detailed reasons for the final rulemaking actions it took and, in several instances, changed its proposed regulations in direct response to petitioners' comments.⁸⁷ The final regulations in issue in this case establish Section 301 effluent limitations, Section 304 effluent limitation guidelines, Section 306 standards of performance, and Section 307 pretreatment standards for the inorganic chemicals category.

SUMMARY OF ARGUMENT

The Federal Water Pollution Control Act Amendments of 1972 ("Act"), 33 U.S.C. §§ 1251 *et seq.*, fundamentally revised the federal regulatory system for abating water pollution. Under prior law, discharges of pollutants were regulated by controls based on water quality standards. This method required proof that a particular discharge would adversely affect the water quality of the receiving waters and cause water quality to exceed applicable standards. In addition, the federal government had a secondary role in establishing water quality standards and enforcing their violation. Congress found this pre-1972 method for abating water pollution to be ineffective.

In the 1972 Act, Congress established a radically different water pollution control program. The program is based on the premise that any discharge of pollutants to the navigable waters of the United States is unlawful unless permitted pursuant to the Act. Discharges from

⁸⁶ See *Pet. Brief* 15-19; 38 Fed. Reg. 28174 (1973), App. 60; 39 Fed. Reg. 9611 (1974), App. B.

⁸⁷ See 39 Fed. Reg. 9611 (1974), App. 46-186.

each point source are required at a minimum to comply with national, uniform effluent limitations which are based on available technology and established by the federal Environmental Protection Agency. As a result, discharges of pollutants will be abated on a uniform national basis without requiring proof that the pollutant discharge adversely affects water quality.

Sections 301(b) and 304(b) of the Act require these technology-based effluent limitations to be developed for carefully defined classes and categories of point sources. In order to apply these effluent limitations to each point source discharger, Congress established a permit program under Section 402 of the Act, made it unlawful for any point source to discharge any pollutant without a permit, and required that these effluent limitations be included as minimum conditions in each permit. Pursuant to Sections 301 and 304(b) of the Act, the Administrator of the Environmental Protection Agency has issued regulations promulgating national, uniform technology-based effluent limitations for numerous carefully defined categories of point sources.

The principal issue in this case is the proper interpretation of the requirements of Sections 301, 304(b) and 402 of the Act. These sections establish the effluent limitation control program outlined above. Petitioners challenge the Administrator's authority to promulgate by regulation Section 301 effluent limitations. EPA, Amicus NRDC, and six of the seven U.S. Courts of Appeals that have rendered decisions on this issue believe that the Administrator is authorized by the Act to take such rulemaking action.

Section 301(b) requires each point source to achieve by July 1, 1977, effluent limitations "which shall require the application of the best practicable control technology currently available as defined by the Administra-

tor pursuant to Section 304(b)" Section 301(e) requires that "[e]ffluent limitations established pursuant to this section . . . shall be applied to all point sources of discharge" Section 501(a) provides that "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this act." Other sections of the Act speak of "effluent limitations established under Section 301" or of "effluent limitations under Section 301." (Sections 316(c), 401(a)(1), 401(d), 505(f), 509(b)(1)(E)). Thus, the Administrator is authorized to promulgate by regulation Section 301 effluent limitations. The legislative history of the Act fully supports this conclusion. In addition, a number of statutory requirements could not be effectively implemented if the Administrator were not authorized to establish Section 301 effluent limitations by regulation (*e.g.*, Sections 303(d)(1)(A), 401(a)).

The Act also requires that the Section 301 effluent limitations be national, uniform limitations. Sections 301(b) and 304(b) specifically require the effluent limitations to be established on the basis of "classes and categories" of point sources. Section 301(c) confirms that national, uniform Section 301 effluent limitations must be established. This Section permits the Administrator to grant an individual point source a variance from the 1983 Section 301 effluent limitations if the point source meets the Section 301(c) criteria.

The legislative history fully supports the conclusion that the Section 301 effluent limitations must be national in scope and uniform. For example, during Senate debate of the final bill, Senator Muskie, floor leader for the bill and a principal architect of the Act, stated that

"[T]he Conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve nationally uni-

form effluent limitations based on 'best practicable' technology no later than July 1, 1977." *Leg. Hist.* 162.

The objective of achieving nationally uniform effluent limitations was repeatedly emphasized in the legislative history. Thus, the Administrator is authorized and required by the Act to promulgate by regulation national, uniform Section 301 effluent limitations.

The U.S. Courts of Appeals have exclusive jurisdiction to review the regulations in issue. Section 509 requires review by a U.S. Court of Appeals of "the Administrator's action . . . in . . . promulgating any effluent limitation . . . under section 301"

ARGUMENT

I. THE ENVIRONMENTAL PROTECTION AGENCY IS AUTHORIZED TO ESTABLISH SECTION 301 EFFLUENT LIMITATIONS BY REGULATION

Section 301 states that "[e]ffluent limitations established pursuant to this section . . . shall be applied to all point sources" ⁸⁸ so that "there shall be achieved . . . not later than July 1, 1977, effluent limitations . . . which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b) of this Act" ⁸⁹ Section 501(a) provides that "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act." ⁹⁰ Thus, contrary to

⁸⁸ Section 301(e), 33 U.S.C. § 1311(e).

⁸⁹ Section 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A).

⁹⁰ 33 U.S.C. § 1361(a).

petitioners' contention, the Administrator is authorized to establish Section 301 effluent limitations by regulation.⁹¹

In this case, petitioners contend that effluent limitation guidelines regulations for existing sources can not legally be promulgated under Section 301 and that Section 301 effluent limitations can be established only in the process of issuing permits to individual dischargers pursuant to Section 402. *Pet. Brief* 30-84.

This attack on EPA's authority to issue Section 301 effluent limitations serves as the platform from which petitioners attempt to dismantle the interpretation of the Act upon which EPA has developed its clean water regulatory program in order to meet Congress' mandate that discharges of pollutants be substantially reduced. Petitioners' interpretation of the Act is strained and forced when compared to the straight-forward reading of the Act urged by EPA and Amicus NRDC. Petitioners' interpretation is fatally defective in failing to account for the plain wording of the Act, its structure, and its legislative history. Based on these factors, Amicus NRDC demonstrates in the following discussion that Congress intended that EPA should establish Section 301 effluent limitations by regulation. Accordingly, petitioners' proposed reading of the Act should be rejected and the Section 301 effluent limitations guidelines in issue should be held to have been promulgated as a proper exercise of the Administrator's authority.⁹²

⁹¹ Six of the seven U.S. Courts of Appeals that have rendered decisions on this issue have upheld the Administrator's authority to issue Section 301 effluent limitations by regulation. See cases listed in notes 1 & 2 *supra*.

⁹² As noted in notes 1 & 2 *supra*, six of seven U.S. Courts of Appeals have agreed with this conclusion. The reasons which they present in support of their decisions are similar, although different circuits have emphasized different factors.

For judicial support, petitioners rely solely on the opinions of the U.S. Court of Appeals for the Eighth Circuit in *CPC Interna-*

A. The Act Mandates The Establishment Of Section 301 Effluent Limitations

Both by the Act's explicit language and by establishing an integrated statutory structure which is consistent only with that explicit language, Congress made clear that Section 301 effluent limitations must be established pursuant to Section 301 itself and independent of Section 402.

1. The Language of the Act

Throughout the title of the Act covering "Standards and Enforcement," the Act speaks simply and explicitly of effluent limitations "established under Section 301."⁹³ Thus, and most importantly, Section 301(e) states:

*"Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act."*⁹⁴

Simply stated, Section 301(e) contemplates establishment of Section 301 effluent limitations according to the requirements of Section 301.⁹⁵ Moreover, Section 301(e) makes clear that the effluent limitations "established" under Section 301 "shall be applied to all point sources" by means such as permits issued under Section 402.

tional Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975) and the U.S. District Court in *Grain Processing Corp. v. Train*, 407 F.Supp. 96 (S.D. Iowa 1976) (this case was brought after the *CPC* case *supra*). The errors in the Eighth Circuit's reasoning have been addressed explicitly by several of the other circuit courts.

⁹³ See citation of relevant statutory provisions in text which follows.

⁹⁴ 33 U.S.C. § 1311(e) (emphasis added).

⁹⁵ See *American Meat Institute v. EPA*, 526 F.2d 442, 450 (7th Cir. 1975); *American Frozen Food Institute v. Train*, — F.2d —, —, 8 ERC 1993, 2005-06 (D.C. Cir. 1976).

Other statutory provisions use language similar to Section 301(e) or of similar import and underscore petitioners' error: "Any standard established pursuant to Section 301" in Section 316(b); "effluent limitations established under Section 301" in Section 316(c); "effluent limitations under Section 301" in Sections 401(a)(1), 401(d), 505(f), and 509(b)(1)(E); and "effluent limitations required by [or "under"] Section 301" in Sections 302(a), 303(d)(1)(A), and 303(e)(3)(A).⁹⁶

The language of these provisions makes clear that the Act intends that effluent limitations are to be established under Section 301 and independent of Section 402, thereby wholly refuting petitioners' interpretation. This is the course which the EPA Administrator has followed in the challenged regulations and it is the proper legal course.

2. The Statutory Structure

Analysis of the statutory structure for developing, applying, reviewing, and enforcing effluent limitations underscores the conclusion reached above: Section 301 effluent limitations are to be established under Section 301 itself. A detailed analysis of the statutory structure which demonstrates that this conclusion is correct is set out at pages 14-19 *supra*. Only the more salient aspects will be emphasized below.

First, there is the explicitly stated relationship between Sections 301 and 304. Section 301 requires that "effluent limitations established pursuant to [this] section . . . shall be applied to all point sources" which limitations "shall require application of the best practicable control technology currently available as defined by the Adminis-

⁹⁶ See *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1039 (3d Cir. 1975); *American Meat Institute v. Train*, 526 F.2d 442, 450 (7th Cir. 1975).

trator pursuant to Section 304(b) of the Act"⁹⁷ The close relationship of Sections 304(b) and 301 has been set out above.⁹⁸ Here it is relevant to emphasize simply that the information and analysis developed pursuant to Section 304 serves as the basis for defining the effluent limitations which are established under Section 301.⁹⁹

Second, these Section 301 effluent limitations play a crucial role in establishing and applying water quality related effluent limitations and in the certification process that the states conduct with respect to federal proceedings which allow discharges to occur under other statutory authority.

Absurd results are reached under the water quality provisions of Section 303(d)(1)(A) if effluent limitations may not be established under Section 301. That section requires each state to identify "those waters within its boundaries for which the effluent limitations required by Section 301(b)(1)(A) and Section 301(b)(1)(B) are not stringent enough to implement any water

⁹⁷ 33 U.S.C. §§ 1311(e), (b)(1)(A), (b)(1)(B) (emphasis added).

⁹⁸ See pages 14-18 *supra*; see also *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1039 (3d Cir. 1975).

⁹⁹ Petitioners suggest that "guidelines" under Section 304 would be significantly more flexible than the regulations under Section 301. *Pet. Brief* 26-29 & *passim*. There is no basis in the statute or the legislative history for assuming that Section 304(b) guidelines would allow major variation from plant to plant instead of being specific. See quotes at p. 14 & n.35. The term "guideline" is also used in Section 304(h), 33 U.S.C. § 1314(h), which section mandates EPA to establish specific minimum requirements for state programs. Obviously minimums are to be minimums and such specific requirements can be established by "guidelines" or by "regulations" under the Act. Thus, petitioners' interpretation of and emphasis on the word "guideline" is no more than a make weight argument in petitioners' analysis of Sections 301 and 304.

quality standard applicable to such waters.”¹⁰⁰ Water quality standards are often defined in precise quantitative terms: “x” parts per thousand of total dissolved solids or a temperature level of “y” degrees Fahrenheit.¹⁰¹ It is impossible to relate the general Section 301 statutory standard of “best practicable control technology currently available” to a precise, numerical state water quality standard until the Section 301 statutory standard is itself given particular definition as a numerical effluent limitation with respect to the point source discharges being considered. Therefore, Section 303(d)(1)(A) makes sense only if establishment of particularized Section 301 effluent limitations was intended.

In addition if Section 301 effluent limitations could be established only by being incorporated in a Section 402 permit, then the water quality standards planning process required by Section 303 could not be effectively implemented. In brief, the Section 303 process requires, *inter alia*, the following: (a) designation of water quality limited segments based on a determination that Section 301 effluent limitations are not stringent enough to achieve water quality standards for that segment; this requires a comparison of the limitations with the standards; (b) a determination of total maximum daily load for discharges of pollutants from point sources into the water quality limited segment.¹⁰² Then this total maximum daily load is allocated among the point sources which discharge into the segment and the resulting effluent limitation, which is necessarily more stringent than the Section 301 effluent limitation, is incorporated in the discharger’s permit issued pursuant to Section

¹⁰⁰ 33 U.S.C. § 1313(d)(1)(A).

¹⁰¹ *E.g.*, New York State standards for class “AA” waters require that for the concentration of total dissolved solids “in no case shall it exceed 500 milligrams per liter.” 6 N.Y.C.R.R. § 701.4.

¹⁰² Sections 303(d), (e), 33 U.S.C. §§ 1313(d), (e).

402.¹⁰³ Thus, establishment of Section 301 effluent limitations must precede issuance of Section 402 permits if the Section 303 water quality waste load allocation process is to be effectively implemented.

It is important to emphasize that the water quality provisions of Sections 302 and 303 mention Section 301 but not Section 402, thereby demonstrating that Section 301 effluent limitations are to be established independently of Section 402.

Section 401(a)(1) requires each applicant for a federal license permitting a discharge to obtain a state certification that its proposed discharge will comply with Sections 301 and 306 of the Act and further requires:

“In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302, and there is not an applicable standard under sections 306 and 307, the State shall so certify”¹⁰⁴

¹⁰³ Sections 402(b)(1)(A), 301(b)(1)(C), 33 U.S.C. §§ 1342(b)(1)(A), 1311(b)(1)(C).

¹⁰⁴ 33 U.S.C. § 1341.

Moreover, and of particular importance, in Section 401 Congress specifically treated Section 301 “effluent limitations” as of equal importance and as of similar independent significance as the Sections 306 and 307 “standards.” Similarly, in Section 316(b), Congress specifically referred to the Section 301 effluent limitations as “standards.” 33 U.S.C. § 1316(b) (“Any standard established pursuant to section 301 or section 306”). And, in the Conference Report, Congress states: “Section 302 would permit the setting of more stringent standards than those required by section 301” S. REP. NO. 92-1236 (Conf. Rpt.) note 49 *supra*, at 122, *Leg. Hist.* 305; *see also id.*, at 320 (“Any standard established pursuant to section 301 or 306”).

Thus, contrary to Amicus American Petroleum Institute’s repeated assertions, the different statutory terms—“standards” and “effluent limitations”—are of no relevance in determining if Congress intended EPA to establish national Section 301 effluent limitations by regulation. Brief of Amicus Petroleum Institute 26-31. Amicus American Paper Institute advances similar arguments. Brief

of Amicus American Paper Institute 44-45. In fact, in light of Amicus American Petroleum Institute's statement "that Congress consistently used the term 'standards' when it intended EPA to promulgate fixed, *across-the-board* restrictions by regulation," *Id.* 25 (emphasis of "consistently" added; other emphasis in original) the Section 316(b) reference to "standard established pursuant to section 301" would seem to be a conclusive determination that EPA and Amicus NRDC's interpretation of the Act is correct. Sections 316(b) and 401(a)(1) also rebut the Eighth Circuit's view that "the term 'standards' . . . takes on a special meaning because of its use under the Act." *CPC International Inc. v. Train*, 515 F.2d 1032, 1038 (8th Cir. 1975).

Amicus American Petroleum Institute attempts to explain away Section 301(b)'s reference to "[a]ny standard established pursuant to Section 301" by asserting that this reference is to Section 301(b)(1)(A)(ii) and that "[e]stablished pursuant to this provision of Section 301, of course, are the pretreatment standards of Section 307(b) & (c), thereby explaining the mention of 'standard' in Section 316(b)." Brief of Amicus American Petroleum Institute 26 n.20 (emphasis in original) (It should be noted that Sections 301(b), 304(b), 316, and 402 apply to *direct* dischargers to navigable waters, including publicly owned treatment works, while Section 307(b) applies to *indirect* dischargers, i.e. discharges into publicly owned treatment works. See pp. 14-19 *supra*.) The Petroleum Institute's argument is without merit. First, if Amicus American Petroleum Institute's assertion were correct, then Section 316(b) would impose no requirements on existing point sources which discharge directly into the nation's navigable waters. Most steam electric power plants, which are the major sources of thermal effluent and which were the focus of Congress' concern in enacting Section 316, are direct dischargers; the Water Pollution Control Federation notes that "[t]he discharge of steam and boiler blow-off to sewers is prohibited in almost all sewer ordinances." *WATER POLLUTION CONTROL FEDERATION, WPCF MANUAL OF PRACTICE NO. 3: REGULATION OF SEWER USE* 18 (1975). And Mr. Clausen, in describing the requirements of Section 316 to the House, stated: "Section 316(b) requires the location, design, construction and capacity of cooling water intake structures of steam electric generating plants to reflect . . ." *Leg. Hist.* 264.

Second, the legislative history regarding Section 316 makes clear that references to Section 301 in Section 316 included those provisions which establish effluent limitations for direct dischargers. See H.R. REP. NO. 92-911, note 23 *supra*, at 117, *Leg. Hist.* 807, S. REP. NO. 92-1236 (Conf. Rep.), note 49 *supra*, at 137, *Leg. Hist.* 320, *Leg. Hist.* 267-68, 273-74.

[Footnote continued on page 41]

This last provision is utter nonsense if no effluent limitations can be established under Section 301. First, without Section 301 limitations which are independent of and precedent to those fixed in a permit, certification of a permit application could not occur. Second, the Section 301 statutory standards were fixed the day the Act was passed, so the certification provision requires for its implementation that more particular Section 301 effluent limitations be established.¹⁰⁵

Third, the Section 509(b)(1) judicial review provision makes clear that the Administrator is authorized to establish Section 301 effluent limitations by regulation. Section 509 provides for judicial review in the U.S. Courts of Appeals:

"of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 301 . . . and (F) in issuing or denying any permit under section 402" ¹⁰⁶

Not only does this section make explicit reference to the action of the Administrator in promulgating Section 301 effluent limitations, but it also makes separate reference to Section 301 effluent limitations and Section 402 permits, demonstrating their independence.¹⁰⁷ Section 505

¹⁰⁴ [Continued]

In sum, there is absolutely no support for Amicus American Petroleum Institute's assertion that the Section 316(b) reference to "standard established pursuant to Section 301" is a reference only and simply to "pretreatment standards" through Section 301(b)(1)(A)(ii).

¹⁰⁵ See *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1038-39 (3d Cir. 1975); *American Meat Institute v. EPA*, 526 F.2d 442, 451 (7th Cir. 1975).

¹⁰⁶ Section 509(b)(1), 33 U.S.C. § 1369(b)(1).

¹⁰⁷ The Third Circuit considered Section 509(b)(1) as providing "[p]erhaps the strongest indication in the Act that the Administrator has the power under Section 301 to promulgate effluent limi-

(f), which provides for citizen suits, contains similar language, reinforcing this conclusion.¹⁰⁸

Finally, enforcement of the Act's requirements is provided by two provisions: enforcement by the federal Administrator is governed by Section 309¹⁰⁹ and enforcement by citizens' suits is governed by Section 505.¹¹⁰ Both provisions assume that Section 301 effluent limitations will be established under Section 301 and independent of Section 402.

Under Section 309, the EPA Administrator is required to take remedial action whenever he

"finds that any person is *in violation of section 301, 302, 306, 307, or 308 of this Act, or is in violation of any permit condition or limitation* implementing any of such sections in a permit issued under section 402 of this Act by him or by a State," ¹¹¹

tations" *American Iron & Steel Institute v. EPA*, 526 F.2d 1029, 1037 (3d Cir. 1975); *See also American Frozen Food Institute v. Train*, — F.2d —, —, 8 ERC 1993, 2006, (D.C. Cir. 1976). The Third Circuit went on to provide a comprehensive and detailed rebuttal of the Eighth Circuit's attempt to discount the importance of Section 509(b)(1). Of particular significance is that the Eighth Circuit found no merit in EPA's analysis of Section 509(b)(1) (which analysis is similar to that in the text *supra*) on the ground that the reference to Section 301 in Section 509(b)(1) "is necessary if the Administrator's action under § 301(c) . . . is to be subject to judicial review." *CPC International, Inc. v. Train*, 515 F.2d 1032, 1043 (8th Cir. 1975); *see Pet. Brief* 82n.72. However, as the Third Circuit noted, Section 509 contained the reference to Section 301 in both the Senate and House bills and Section 301(c) as adopted was only added to the Act in the Conference Report. *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1037 & n.16 (3d Cir. 1975).

¹⁰⁸ Section 505(f), 33 U.S.C. § 1365(f).

¹⁰⁹ 33 U.S.C. § 1319.

¹¹⁰ 33 U.S.C. § 1365.

¹¹¹ 33 U.S.C. § 1319(a)(3) (emphasis added).

Thus, this section contemplates that Section 301 effluent limitations will be developed which are independent of and enforceable apart from a permit issued under Section 402.¹¹² These Section 301 effluent limitations must be specific and precise since violation of Section 301 subjects a discharger to civil penalties of a substantial nature:

"Any person who *violates section 301, 302, 306, 307 or 308 of this Act, or any permit condition or limitation* implementing any of such sections in a permit issued under section 402 of this Act . . . shall be subject to a civil penalty not to exceed \$10,000 per day of such violation." ¹¹³

There is also the possibility of criminal penalties under Section 309(c)(1) where there has been willful or negligent violation of Section 301.¹¹⁴

¹¹² Despite the specific language of Section 309 and the other statutory language set out *supra*, petitioners contend that Section 301 is wholly dependent upon Section 402 and can be implemented only in each Section 402 permit. *E.g., Pet. Brief* 26-30 & *passim*. Congress, however, contemplated that a person could be in violation of Sections 301(a) and 301(b) independent of Section 402. *See* statutory language *supra*. The Senate Report states, with respect to Section 505, that "[i]n addition to violations of Section 301(a), citizens . . . [may] bring enforcement action for violations of effluent limitations under Section 301 . . . and any condition of any permit issued under section 402." S. REP. NO. 92-414, note 28 *supra*, at 82, *Leg Hist.* 1500.

Moreover, the fact that the statutory language and the legislative history recognize that Section 301 effluent limitations are enforceable independently of the permit system eliminates another factor relied on by the Eighth Circuit in holding that the Administrator is not authorized to establish Section 301 effluent limitations by regulation. *See CPC International Inc. v. Train*, 515 F.2d 1032, 1038 (8th Cir. 1975).

¹¹³ 33 U.S.C. § 1319(d) (emphasis added).

¹¹⁴ 33 U.S.C. § 1319(c)(1).

Section 505, which governs enforcement of the Act through citizens' suits, permits one to sue "any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this Act. . . ." ¹¹⁵ For the purposes of Section 505, "effluent standard or limitation" is defined in six separate subsections to be, *inter alia*, "(2) an effluent limitation or other limitation under section 301 . . . or . . . (6) a permit or condition thereof issued under Section 402 . . ." ¹¹⁶ If Section 301 effluent limitations could be established only by means of Section 402 permits, then subsections (2) and (6) would be redundant. ¹¹⁷

In sum, the enforcement provisions of the Act make clear that Congress intended that Section 301 effluent limitations would be established under Section 301 itself and independent of any other provision of the Act, including Section 402.

Petitioners contend, however, that the Act does not authorize the Administrator to issue effluent limitations regulations under Section 301. ¹¹⁸ The Third Circuit concluded, and other circuits agree, that "the promulgation of regulations establishing [Section 301(b)] limitations is within his inherent rulemaking power." ¹¹⁹ This power is provided by Section 501:

¹¹⁵ 33 U.S.C. § 1365(a)(1).

¹¹⁶ 33 U.S.C. § 1365(f) (emphasis added).

¹¹⁷ *Accord* American Iron & Steel Institute v. EPA, 526 F.2d 1027, 1038 (3d Cir. 1975); American Meat Institute v. EPA, 526 F.2d 442, 451 (7th Cir. 1975).

¹¹⁸ *Pet. Brief* 26-30.

¹¹⁹ American Iron & Steel Institute v. EPA, 526 F.2d 1027, 1039 (3d Cir. 1975) (footnote omitted). *See also* E.I. duPont de Nemours & Co. v. Train, — F.2d —, —, 8 ERC 1718, 1721 (4th Cir. 1976); Hooker Chemicals & Plastic Corp. v. Train, — F.2d —, —, 8 ERC 1961, 1966 (2d Cir. 1976); American Frozen Food Institute v. Train, — F.2d —, —, 8 ERC 1993, 2006 (D.C. Cir. 1976).

"The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act." ¹²⁰

In support of their position, petitioners rely strongly on the contention that Congress intended the States to have an important role in administering the Section 402 permit program and that this goal would be defeated by EPA's establishment of Section 301 effluent limitations by regulation. ¹²¹ The basic tenet of petitioners' argument is that if EPA can establish national, uniform Section 301 effluent limitations by regulation, then state permit authorities will have no real responsibilities under their Section 402 NPDES permit program such as a responsibility to "make factual findings based upon particular circumstances at individual plants." ¹²² Petitioners characterize their argument by stating:

"State authorities were not to be mere *scriveners* whose only task is to 'mechanically crank' EPA-promulgated national standards ('limitations') into permits." ¹²³

But petitioners' brief contains no factual analysis of what state permit authorities do in conducting a permit proceeding and issuing permits. The facts completely rebut petitioners' assertions. As discussed in detail at pages 20-24 *supra*, state permit authorities have numerous responsibilities and tasks to perform under the Section 402 permit program, only one of which is applying Section 301 effluent limitations to individual point sources, and this action itself requires the exercise of professional judgment and expertise. Moreover, as provided

¹²⁰ 33 U.S.C. § 1361(a).

¹²¹ *Pet. Brief* 35-36, 42, 49-60.

¹²² *Pet. Brief* 27.

¹²³ *Id.* 58 (emphasis added).

by Section 510, states may require any point source to meet effluent limitations more stringent than those established by EPA.¹²⁴

In sum, EPA's issuance of national, uniform, minimum Section 301 effluent limitations does not divest state permit authorities of responsibility and reduce them to "mere scriveners."

B. The Legislative History Demonstrates That The Act Mandates The Establishment Of Section 301 Effluent Limitations

The legislative history of the Act makes clear that Congress intended that Section 301 effluent limitations would be established pursuant to Section 301 and independent of Section 402 permits. This conclusion is demonstrated by explicit references to "effluent limitations established under Section 301" as well as by discussion of "section 301 standards" and of Section 301 as being the "environmental control" section. All of these references are consistent only with the interpretation that enforceable effluent limitations are to be established under Section 301 itself and not just in Section 402 permits.

It is important to emphasize at the outset that the legislative history demonstrates that Congress fully intended EPA to issue regulations pursuant to Sections 301 and 304(b) of the Act, just as EPA has done in this case, demonstrating that EPA's rulemaking proceeding is wholly consistent with the Act's requirements under Section 301. Thus, Senator Bentsen, a key member of the Senate Public Works Committee, stated during debate on the Senate bill:

"In phase I, for point sources of pollutants, effluent limits shall be established not later than January 1, 1976, [now July 1, 1977], which comply with spe-

¹²⁴ Section 510, 33 U.S.C. § 1370.

cifically defined levels of effluent control and treatment. As defined in section 301(b)(1) of the bill, and as elaborated in the regulations which we anticipate the Administrator shall issue pursuant to section 301 and section 304, these 1976 [now 1977] goals shall be at least . . . the 'best practicable control technology currently available' for [industrial] point sources" ¹²⁵

And Representative Clausen, a member of the Conference Committee, stated during House debate on the conference report:

"The Administrator should consider the results of [the] studies [required by Section 104(t)] in promulgating regulations not only under Section 316 but also under other sections of the act where thermal discharge may be regulated, including Section 301 on effluent limitations, Section 303 on water quality standards and Section 306 on new source performance standards." ¹²⁶

With respect to EPA's authority to establish effluent limitations pursuant to Section 301, the House Report, in discussing the Administrator's authority under Section 302 to change or modify Section 301 effluent limitations, states:

"Proposed effluent limitations under section 302 shall in no case operate to delay the application of

¹²⁵ Leg. Hist. 1283 (emphasis added). See *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1040 (3d Cir. 1975); *American Meat Institute v. EPA*, 526 F.2d 442, 451 (7th Cir. 1975); *Hooker Chemicals & Plastics Corp. v. Train*, — F.2d —, —, 8 ERC 1961, 1965-66 (2d Cir. 1976).

¹²⁶ Leg. Hist. 264. See *Hooker Chemicals & Plastics Corp. v. Train*, — F.2d —, —, 8 ERC 1961, 1966 (2d Cir. 1976); *American Frozen Food Institute v. Train*, — F.2d —, —, 8 ERC 1993, 2001 (D.C. Cir. 1976).

*any effluent limitation established under section 301."*¹²⁷

Similarly, the Conference Report states:

"Section 302 requires more stringent standards than those required by section 301 if such effluent limits would interfere with attaining the 1981 interim goal."¹²⁸

The Report then states that the House Amendment to Section 302,

"would permit the setting of more stringent *standards* than those required by section 301, essentially using the same tests as the Senate bill."¹²⁹

Similarly, the legislative history regarding the state certification provision of the Act, Section 401, shows that Congress intended Section 301 to have independent status and effect. During Senate debate on the original Senate bill, Senator Muskie explained the scope of Section 401 and said:

"This section . . . requires that any applicant for a Federal license or permit provide the licensing agency with a certification from the State in which the discharge occurs that any such discharge will comply with section [sic] 301 and 302, *which are the environmental control sections.*"¹³⁰

Likewise, the House Report states:

"This [Section 401] certification must state that any such *discharge will comply with the 'applicable' pro-*

¹²⁷ H.R. REP. NO. 92-911, note 23 *supra*, at 104, *Leg. Hist.* 791 (emphasis added).

¹²⁸ S. REP. NO. 92-1236 (Conf. Rep.), note 49 *supra*, at 121, *Leg. Hist.* 304 (emphasis added). See cases listed in note 125 *supra*.

¹²⁹ *Id.*, at 305 (emphasis added). See note 104 *supra* for detailed discussion of references in the Act to Section 301 standards.

¹³⁰ *Leg. Hist.* 1388 (emphasis added).

*visions of sections 301, 302, 306, 307 and 316 of this Act."*¹³¹

No reference is made to Section 402.

Finally, the legislative history of the two major enforcement provisions of the Act, Sections 309 and 505, repeatedly underscores the independent status of Section 301 requirements, violation of which is subject to both civil and criminal liability. Thus, the Senate Report states:

"When EPA finds anyone violating Sections 301, 302, 306, 307, 308, or 402, the agency must either issue an order that requires immediate compliance or bring a civil suit

"Anyone willfully or negligently violating a Section 402 permit or any of several other specific sections of the bill shall be liable to a fine of up to \$25,000 per day of violation and one year in jail. For a willful negligent *violation of Sections 301, 302, 306, 307, or 402*, the fine shall be not less than \$2,500 per day."¹³²

Similarly, the House Report states:

"In the case of a willful or negligent *violation* by any person of *section 301, 302, 306, 307, 308, or 316, or any permit condition or limitation*"¹³³

Regarding the citizen suit enforcement provision, Section 505, the Senate Report states:

"Authority granted to citizens to bring enforcement actions under this section is limited to effluent stand-

¹³¹ H.R. REP. NO. 92-911, note 23, *supra*, at 121, *Leg. Hist.* 808 (emphasis added).

¹³² S. REP. NO. 92-414, note 28, *supra*, at 63, *Leg. Hist.* 1481 (emphasis added).

¹³³ H.R. REP. NO. 92-911, note 23, *supra*, at 115, *Leg. Hist.* 802 (emphasis added).

ards or limitations established administratively under the Act

"In addition to violations of section 301(a), citizens are granted authority to bring enforcement actions for violations of schedules or timetables of compliance and *effluent limitations under section 301, . . . and any condition of any permit issued under section 402.*"¹³⁴

In sum, the legislative history fully supports the conclusion that Section 301 effluent limitations are to be established and enforced independent of any other section of the Act, including Section 402. Accordingly, contrary to petitioners' contention, EPA is authorized to establish Section 301 effluent limitations by regulation and acted in compliance with the Act's requirements in promulgating regulations establishing the Section 301 effluent limitations which have been challenged in this case.

II. THE ACT MANDATES ESTABLISHMENT OF NATIONAL, UNIFORM SECTION 301 EFFLUENT LIMITATIONS FOR CONTROLLING DISCHARGES OF POLLUTANTS WITHIN CATEGORIES OF INDUSTRY

In the regulations challenged in this case, EPA established national, uniform effluent limitations¹³⁵ for specific, carefully defined classes and categories of industrial

¹³⁴ S. REP. NO. 92-414, note 28 *supra*, at 81-82, *Leg. Hist.* 1499-1500 (emphasis added) (*see* note 112 *supra* for additional discussion of this reference).

¹³⁵ This phrase refers to the Section 301 "effluent limitations," the Section 306 "standards of performance," and the Section 304(b) "effluent limitations guidelines" which have been promulgated by the regulations in issue. *See* note 9 *supra*.

point sources as required by Sections 301 and 304(b) of the Act.¹³⁶

Petitioners contend that Section 301 effluent limitations can be established only on a point source by point source basis. Petitioners argue that each of the thousands of industrial point sources must be analyzed individually

¹³⁶ EPA has promulgated a "variance clause" which is part of each Section 301 effluent limitation regulation. *See, e.g.*, 39 Fed. Reg. 9611 (1974), App. 32b. The variance clause provides that if factors regarding a discharger "are fundamentally different from the factors considered in the establishment of the guidelines . . . [then the] effluent limitations in the NPDES permit [may be] either more or less stringent than the limitations established [in the regulation], to the extent dictated by such fundamentally different factors." *Id.*

Amicus NRDC believes that EPA is required by the Act to publish national, uniform Section 301 effluent limitations and that the variance clause is not sanctioned by the Act. NRDC contested EPA's promulgation of the variance clause; the U.S. Court of Appeals for the Second Circuit upheld EPA's action. *Natural Resources Defense Council v. EPA*, — F.2d —, 8 ERC 1988 (2d Cir. 1976). (Other circuits have upheld the variance clause: *E. I. duPont de Nemours v. Train*, — F.2d —, —, 8 ERC 1718, 1722 (4th Cir. 1976); *American Frozen Food Institute v. Train*, — F.2d —, —, 8 ERC 1993, 2016-18 (D.C. Cir. 1976).)

In *NRDC v. EPA*, *supra*, the Circuit Court did not address one of NRDC's principal arguments: that Congress explicitly provided means for meeting hardships encountered in complying with Section 301 effluent limitations. Section 8 or the Federal Water Pollution Control Act Amendments of 1972 amended Section 7 of the Small Business Act, 15 U.S.C. § 636, to provide loans "to assist any small business concern . . . to meet water pollution control requirements established under the [FWPCA]" *See Leg. Hist.* 1355, where Sen. Nelson, author of the amendment, stated: "The alternative to such incentives as extending pollution control loans would be waiving strict environmental standards where economic hardship could be shown. But the approach of giving variances to pollution controls based on economic grounds has long ago shown itself to be a risky course: All too often, the variances become a tool used by powerful political interests to obtain so many exemptions for pollution control standards and timetables on the flimsiest of pretenses that they become meaningless. In short, with variances, exceptions to pollution cleanup can become the rules, meaning further tragic delay in stopping the destruction of our environment."

under the entire array of factors set out in Section 304 (b) of the Act. Petitioners oppose the establishment of Section 301 effluent limitations by classes and categories of point sources.

In sum, petitioners' position is inconsistent with the requirements of the Act and, if adopted, would result in impractical and chaotic administration of the Act, since each of the approximately 40,000 industrial point source permit proceedings would become a *de novo* standard setting proceeding.¹³⁷ Such a result would severely tax EPA's and the states' resources and seriously impair their ability to meet their obligations under the Act.¹³⁸ Congress foresaw and avoided this course in mandating the establishment of national, uniform Section 301 effluent limitations by classes and categories of point sources. Thus EPA's interpretation of the Act's requirements is correct and must prevail over that of petitioners.¹³⁹

It is important to emphasize that the discussion in Section I of this Brief, pages 33-50 *supra*, has demonstrated that the Act requires EPA to establish Section 301 effluent limitations pursuant to Section 301 itself and independent of Section 402. The analysis presented below confirms and underscores the conclusion which follows from the analysis and discussion of Section I.

The conclusion that the Act requires establishment of national, uniform effluent limitations under Section 301 for specific classes and categories of point source dischargers follows from two factors: the explicit requirements of Sections 301 and 304 regarding the application

¹³⁷ See note 18 *supra*.

¹³⁸ *Accord*, E.I. duPont de Nemours & Co. v. Train, — F.2d —, 8 ERC 1718, 1722 (4th Cir. 1976).

¹³⁹ Regarding the "uniformity" issue, of the five circuit courts that have considered the issue, four have essentially upheld EPA's position. See pp. 2-3 *supra* and note 172 *infra*.

of the "classes and categories" concept; and the legislative history which elaborates upon the meaning of these statutory requirements and which confirms Amicus NRDC's interpretation of the Act. The basic reason Congress developed the "classes and categories" concept was to enable EPA to prescribe national, uniform effluent limitations which were deemed essential for effectively abating pollution of the Nation's waters.

A. The Requirements Of Sections 301 And 304

Section 301 prescribes two effluent limitation requirements for existing point sources—one to be achieved by July 1, 1977, the other by July 1, 1983.¹⁴⁰ These requirements are to be "defined" or "determined" by regulations developed pursuant to Section 304(b).¹⁴¹ The sections are identical in structure and use essentially identical language. This unity emphasizes the common objectives of these sections, particularly that of utilizing specific classes and categories of point sources as the basis for prescribing Section 301 effluent limitations.

Thus, Section 304(b)(1)(A), pursuant to which the Section 301(b)(1)(A) "best practicable" standard is to be "defined," requires publication of effluent limitations guidelines which shall:

" . . . identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources" ¹⁴²

¹⁴⁰ Section 301(b)(1)(A), (b)(2)(A); 33 U.S.C. §§ 1311(b)(1)(A), (b)(2)(A).

¹⁴¹ Section 304(b)(1)(A), (b)(2)(A); 33 U.S.C. §§ 1314(b)(1)(A), (b)(2)(A).

¹⁴² 33 U.S.C. § 1314(b)(1)(A) (emphasis added).

Similarly, Section 304(b)(2)(A), pursuant to which the Section 301(b)(2)(A) "best available" standard is to be "determined,"¹⁴³ also requires publication of effluent limitations guidelines "for classes and categories of point sources."¹⁴⁴ Then, Sections 304(b)(1)(B) and (b)(2)(B), which relate to the "best practicable" and "best available" standards, require the regulations to

"[s]pecify factors to be taken into account in determining . . . measures and practices to be applicable to point sources . . . *within such categories or classes.*"¹⁴⁵

These provisions make clear that Congress intended that effluent limitations be developed for specific classes and categories of point sources.¹⁴⁶

¹⁴³ This is the term used in Section 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A), as compared with "defined" in Section 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A). No difference in substance or operation of the two subsections is reflected by this different terminology nor is any suggested by the legislative history.

¹⁴⁴ 33 U.S.C. § 1314(b)(2)(A).

¹⁴⁵ Section 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B) (emphasis added). Section 304(b)(2)(B) is virtually identical:

"specify factors to be taken into account in determining the best measures and practices . . . to be applicable to any point source . . . with such categories or classes."

In only one instance do Sections 301 and 304(b) differ in referring to "classes and categories of point sources" as the basis for establishing effluent limitations. This occurs in Section 301(b)(2)(A). The detailed discussion of the reasons why the phrase was included in Section 301(b)(2)(A) as a result of House amendments to the Senate bill and adoption of a Conference substitute is presented at pages 56-58 *infra*; this difference and the process which produced it reinforces the conclusion evidenced by the provisions quoted above that Congress intended that uniform effluent limitations be developed for specific classes and categories of point sources.

¹⁴⁶ See *E.I. duPont de Nemours & Co. v. Train*, — F.2d —, —; 8 ERC 1718, 1722-23 (4th Cir. 1976); *Hooker Chemicals & Plastic Corp. v. Train*, — F.2d —, —, 8 ERC 1961, 1968 (2d Cir. 1976); *American Frozen Food Institute v. Train*, — F.2d —, —, 8 ERC 1993, 2008-09 (D.C. Cir. 1976).

Section 306, which applies to new sources and which also requires establishment of effluent limitations¹⁴⁷ for classes and categories of point sources, indicates more clearly what Congress expected EPA to do in determining appropriate "classes and categories."¹⁴⁸ In Section 306(b)(1)(A) Congress listed 27 industrial categories for which "at a minimum" EPA was required to develop effluent limitations.¹⁴⁹ Congress recognized that significant differences existed among both plants and effluent discharges included in these broad industrial categories. Therefore, Congress provided that:

"The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous)."¹⁵⁰

Factors which EPA considers in determining appropriate classes and categories of point sources for the regulations in issue include those specified in Section 304(b)¹⁵¹ and are set out in the "Advance Notice of Public Review Procedures" published by EPA to inform interested persons about the specific steps involved in developing effluent limitations regulations.¹⁵²

Thus, the dispute between petitioners on the one hand and EPA and Amicus NRDC on the other is not whether there are variations among industrial discharges—there

¹⁴⁷ Under Section 306, "effluent limitations" are called "standards of performance," 33 U.S.C. § 1316(a)(1). See note 9 *supra* and Section 502(11), 33 U.S.C. § 1362(11) (quoted in note 65 *supra*).

¹⁴⁸ 33 U.S.C. § 1316.

¹⁴⁹ 33 U.S.C. § 1316(b)(1)(A).

¹⁵⁰ 33 U.S.C. § 1316(b)(2).

¹⁵¹ 33 U.S.C. § 1314(b).

¹⁵² See ¶ 2, 38 Fed. Reg. 21202 (1973), App. 24-25.

clearly are. The basic question is how Congress instructed EPA to deal with these variations in developing effluent limitations. EPA and Amicus NRDC contend that the Act authorizes EPA to identify specific classes and categories of point sources for which Section 301 effluent limitations are to be developed so that these limitations can be applied uniformly to the point sources within each category. Petitioners argue that the Act requires publication of general guidelines which will then be adjusted and revised for each point source discharge based on the individual characteristics of the applicant's discharge, or essentially that the Act requires *de novo* development in each permit proceeding of the Section 301 effluent limitations.

B. The Legislative History Of Sections 301 And 304

Two aspects of the legislative history demonstrate that Amicus NRDC's interpretation of the Act is correct. The first consists of relevant portions of the detailed report on the meaning and operation of Sections 301 and 304 which Senator Muskie, principal author of the Act, submitted to the Senate during final debate on the Conference Report. The second consists of a detailed discussion of the legislative history pertinent to Section 301(c) of the Act, a provision which was developed in Conference in order to resolve differences regarding the 1983 effluent limitations requirements.

The clearest, most detailed discussion in the legislative history about the meaning and operation of Sections 301 and 304 is contained in Senator Muskie's detailed report.¹⁵³ As relevant to the issues involved in this case,

¹⁵³ Senator Muskie was a principal author of the FWPCA Amendments of 1972 and a major force in achieving their enactment. Regarding the comprehensive, detailed report which he prepared on each of the significant provisions of the bill, *Leg. Hist.* 166-184, most courts have accorded it weight in determining the intended

Senator Muskie affirmed three points, which are basic to Amicus NRDC's position. First, the Conferees agreed that Section 301 effluent limitations would be established for specific classes and categories of point sources as defined by Section 304(b).¹⁵⁴ Second, the Conferees intended that the various factors which must be considered in determining "best practicable" and "best available" control technology must be taken into account at the time effluent limitations are established and not when they are applied to particular dischargers.¹⁵⁵ Third, the Conferees intended that Section 301 effluent limitations would be uniform and that the only variance from such uniformity permitted by the Act is that allowed by Section 301(c),

meaning and operation of the Act. *See, e.g.,* American Iron & Steel v. EPA, 526 F.2d 1027, 1037 n. 15, 1040-41 (3d Cir. 1975); American Meat Institute v. EPA, 526 F.2d 442, 451-52 (7th Cir. 1975); Hooker Chemicals & Plastics Corp. v. Train, — F.2d —, —, 8 ERC 1961, 1966 (2d Cir. 1976); American Frozen Food Institute v. Train, — F.2d —, —, 8 ERC 1993, 1998-99 (D.C. Cir. 1976); Natural Resources Defense Council v. Train, 510 F.2d 692 (D.C. Cir. 1974); CPC International Inc. v. Train, 515 F.2d 1032, 1042 (8th Cir. 1975); *Contra* Grain Processing Corp. v. Train, 407 F. Supp. 96, 103 (S.D. Iowa 1976); *cf. Pet. Brief* 42 n.43, 60-63. It is relevant to note that Senator Jackson's criticism of Senator Muskie's report (which is quoted at *Pet. Brief* 61) was directed only at issues involving Section 511(c) which is concerned primarily with the applicability of the National Environmental Policy Act to the FWPCA. *See Leg. Hist.* 204. Moreover, petitioners also rely on Sen. Muskie's report in support of their arguments. *See Pet. Brief* 55-56, 67.

¹⁵⁴ *Leg. Hist.* 171. ("Section 304(b), as agreed to by the Conferees, requires that the Administrator publish regulations which shall provide guidelines for the establishment of the effluent limitations to be achieved by categories and classes of point sources (other than publicly owned treatment works) pursuant to section 301(b) of the Act.")

¹⁵⁵ *Leg. Hist.* 172. ("The Conferees intend that the factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class.")

which applies only to effluent limitations which implement the 1983 "best available" standard:

"Except as provided for in section 301(c) of the Act, the intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations."¹⁵⁶

These conclusions are also stated in the Conference Report:

"The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination. However, after July 1, 1977, the owner or operator of a plant may seek relief from the requirement to achieve effluent limitations based on best available technology economically achievable."¹⁵⁷

As stated at the beginning of this brief,¹⁵⁸ a basic objective of the Act is to develop national, uniform Section 301 effluent limitations. Congress was interested in avoiding competitive disadvantage from occurring among existing plants by preventing industries from inducing local authorities, based, for example, on reasons of economic development or local dependence on a dominant industry, to grant the industry permission to discharge pollutants to the Nation's waters at rates exceeding the

¹⁵⁶ *Id.* (italicization of section reference omitted).

¹⁵⁷ S. REP. NO. 92-1236 (Conf. Rep.), note 49 *supra*, at 121 (1972), *Leg. Hist.* 304. See *American Frozen Food Institute v. Train*, — F.2d —, —, 8 ERC 1993, 1996 (D.C. Cir. 1976).

¹⁵⁸ See pages 5-19 *supra*.

national limitations.¹⁵⁹ This emphasis on uniformity appears repeatedly in the legislative history.¹⁶⁰

National uniformity was the first consideration which Senator Muskie laid before the Senate during its final debate on the bill.¹⁶¹ The point was emphasized by Senator Muskie in the detailed analysis of the Act which he submitted to the Senate during final debate on the Conference Report. First, in discussing the resolution by the Conferees of the relationship of the cost-benefit analysis required by Section 304(b)(1) for the purpose of defining 1977 "best practicable control technology," Senator Muskie reported:¹⁶²

¹⁵⁹ See the discussion of Sen. Nelson quoted in note 136 *supra* which indicates Congress' concern regarding variances from the pollution control standards established under the Act.

¹⁶⁰ See *Leg. Hist.* 132, 156, 162, 170, 172, 209, 263, 309, 451-53, 466-67, 473-75, 516-17, 577, 711, 727, 1219, and 1405. And see discussion and citations at pages 10-11, 13-14, 17-18 *supra*.

¹⁶¹ *Leg. Hist.* 162:

"Senators will recall from the November debate on the Senate bill that there were three essential elements to it: Uniformity, finality, and enforceability. Without these elements a new law would not constitute any improvement on the old; we would not bring a conference agreement to the floor without them.

"As far as uniformity and finality are concerned, the conference agreement provides that each polluter within a category or class of industrial sources will be required to achieve nationally uniform effluent limitations based on 'best practicable' technology no later than July 1, 1977."

¹⁶² This same point on the consideration of economic impact was made explicitly by Rep. Dingell in the House:

"The conference report emphasizes on page 121 a very important point, the report states:

"The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination."

[Footnote continued on page 60]

"The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or to determine the economic impact of controls on any individual plant in a single community."¹⁶³

Second, as already shown, Senator Muskie made the same point regarding uniformity in discussing the possibility of obtaining variances under Section 301(c) from the 1983 "best available control technology" standard.¹⁶⁴

Uniformity was also a primary goal sought by the Administrator of EPA. In commenting at length on the final bill, William Ruckelshaus, then Administrator of EPA, stated:

"Despite the national character of pollution, it has not been dealt with uniformly. Varying local revenue capabilities, economic pressures, and citizen interest have often stagnated community and State initiative. To assure equity and national progress the Federal Government undertook to coordinate and support the many various efforts to control water pollution.

". . . To overcome these existing disparities, the Administration proposed that 'standards be amended

¹⁶² [Continued]

"Thus, a plant-by-plant determination of the economic impact of an effluent limitation is neither expected, nor desired, and, in fact, it should be avoided." *Leg. Hist.* 254-55.

¹⁶³ *Leg. Hist.* 170. See *American Frozen Food Institute v. Train*, — F.2d —, —, 8 ERC 1993, 1997-2000 (D.C. Cir. 1976).

¹⁶⁴ *Leg. Hist.* 172. The quotation is set out above at page 58.

to impose precise effluent requirements on all industrial sources.' The enrolled bill has done so."¹⁶⁵

In sum, the legislative history confirms the basic points of Amicus NRDC's position—particularly that Section 301 effluent limitations are to be uniform. The legislative history also underscores the conclusion that petitioners' position—that Section 301 effluent limitations are to be established by *ad hoc*, individual decisions by the permit authority in issuing each Section 402 permit—is wholly inconsistent with a basic purpose of the Act.

A brief discussion of the factors EPA considered in developing the Section 301 effluent limitations in issue demonstrate that the challenged regulations conform with the Act's requirements. EPA divided the inorganic chemicals category into twenty-two separate subcategories based on factors such as "raw material used, product produced, manufacturing process employed, age, size, waste water constituents, and other factors" ¹⁶⁶ For each subcategory, waste water constituents and applicable control and treatment technologies were identified.¹⁶⁷ This identification included determining, for example, the effluent level produced by applying each technology, the "problems, limitations and reliability of each technology . . .", non-water quality environmental impacts of each technology, and the costs of applying each technology.¹⁶⁸ Then the Section 304(b)(1) "best practicable control technology currently available" was identified as a result

¹⁶⁵ *Leg. Hist.* 156 (Ltr. fr. William Ruckelshaus, Administrator, EPA, to Office of Management and Budget, Executive Office of the President, Oct. 11, 1972, recommending presidential approval of the FWPCA).

¹⁶⁶ 38 Fed. Reg. 28174 (1975), App. 65; see EPA's "Advance Notice of Public Review Procedures," 38 Fed. Reg. 21202 (1973), App. 24-25, for a general discussion of the factors considered.

¹⁶⁷ *Id.*, App. 66.

¹⁶⁸ *Id.*

of considering various factors including age of equipment and facilities, process employed, engineering aspects of applying various control techniques, process changes, non-water quality environmental impact (including energy requirements), costs and benefits of applying the technology, and other factors.¹⁶⁹ Finally, effluent limitations—which, for any point source, are either a range of values or a maximum allowable discharge—were established for approximately eleven pollutants.¹⁷⁰ As an example, set out below are effluent limitations for discharges which result from use of the electrolytic process within the hydrogen peroxide production subcategory of the inorganic chemicals category:

"Effluent characteristic	"Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days shall not exceed—
	"Metric units (kilograms per 1,000 kg of product)	
"TSS	0.005	0.0025
Cyanide A0004	.0002
pH	Within the range 6.0 to 9.0.	
	"English units (pounds per 1,000 lb of product)	
"TSS	0.005	0.0025
Cyanide A0004	.0002
pH	Within the range 6.0 to 9.0.	

" 171

Petitioners contend that EPA's effluent limitations guidelines regulations are invalid because, in part, they

¹⁶⁹ *Id.*

¹⁷⁰ 39 Fed. Reg. 9611 (1974), App. B.

¹⁷¹ *Id.*, App. 47b.

fail to establish "ranges" of discharge levels. Petitioners state:

"Congress *expressly* required EPA to issue guideline regulations in the form of ranges of effluent pollutant values" *Pet. Brief* 28 (emphasis added)

The term "range" does not appear in Sections 301 or 304(b). With respect to these sections, the only mention of the term "range" occurs in the legislative history. And all but one of the five circuit courts that have addressed the issue whether the effluent limitations guidelines regulations must establish "ranges" of effluent limitations have held that EPA is not required to establish such "ranges".¹⁷²

As discussed in detail above, the regulations in issue clearly meet the statutory criteria. Moreover, the effluent limitations which result from applying the subcategorization process comprise a range of effluent limitations which four circuit courts have held to be fully consistent with the requirements and policies of the Act and its legislative history, including the statements from the

¹⁷² The cases decided by these four circuits are: *E.I. duPont de Nemours & Co. v. Train*, — F.2d —, 8 ERC 1718, 1723 (4th Cir. 1976) (held that the effluent limitations are "presumptively applicable"); *Hooker Chemicals & Plastics Corp. v. Train*, — F.2d —, —, 8 ERC 1961, 1968 (2d Cir. 1976); *American Frozen Food Institute v. Train*, — F.2d —, —, 8 ERC 1993, 2015-16 (D.C. Cir. 1976); *American Petroleum Institute v. EPA*, — F.2d —, —, 9 ERC —, —, — (10th Cir. 1976) (Slip. Op. 22).

The Third Circuit is the only circuit court that has held that the effluent limitations guidelines regulations must establish "ranges" of effluent limitations. The Third Circuit based this holding on its interpretation of Section 304(b), relying primarily on S. REP. NO. 92-414, note 28 *supra*, at 50, *Leg. Hist.* 1468, *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1045 (3d Cir. 1975).

[Footnote continued on page 64]

legislative history quoted by petitioners in their brief.¹⁷³
Pet. Brief 66-67, *e.g.*:

"The Administrator should establish the range of "best practicable" levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category."¹⁷⁴

Petitioners also argue that the regulations in issue establish national, uniform Section 301 effluent limitations and that the Administrator may not lawfully establish by regulation uniform limitations. *See, e.g., Pet. Brief* 27-29, 63-73. Petitioners' complaint is only with the process for achieving the "[u]niform national technological objectives for effluents [which] were specified in Section 301," since petitioners' acknowledge that Congress intended that such objectives were to be achieved. *Pet. Brief* 49.

Amicus NRDC has discussed in detail the statutory provisions, legislative history, and practical considerations which demonstrate that Congress intended that the Administrator should establish national, uniform, minimum Section 301 effluent limitations by regulation. Petitioners' and Amicus American Petroleum Institute's attempts to counter this analysis are based primarily on two arguments.

First, petitioners contend that in providing for states to issue Section 402 permits, Congress meant to create

¹⁷³ [Continued]

The Seventh Circuit did not address the "range" issue in its opinion, presumably because the parties in the case did not contend "that the requirements of § 304(b) were not complied with." *American Meat Institute v. EPA*, 526 F.2d 42, 448 n.13 (7th Cir. 1975).

¹⁷³ Note 172 *supra*.

¹⁷⁴ S. REP. NO. 92-414, note 28 *supra*, at 50. *Leg. Hist.* 1468.

substantial state control over the determination of the basic Section 301 effluent limitations, which are the central and critical standards of the Act, by having state authorities themselves establish the Section 301 limitations in each individual permit.¹⁷⁵ This is exactly the opposite of what Congress meant to accomplish. The federal Administrator sets every basic effluent limitation and standard in the Act, other than Section 303 ambient water quality standards.¹⁷⁶ Congress granted the Administrator the authority and imposed on him the duty to allow the States to administer the Section 402 permit program, but only if each State established a permit program which would meet the federal requirements established pursuant to the Act.¹⁷⁷ Thus, Rep. Blatnik, Chairman of the House Committee on Public Works and a main sponsor of the bill, wrote in his summary report of the bill:

"All permits issued under this program shall be consistent with the specific requirements of the bill, including effluent limitations" ¹⁷⁸

¹⁷⁵ *See, e.g., Pet. Brief* 11-12, 26-29, 42-43, 51-58. It should be noted, however, that state authorities prescribe schedules of "compliance" for each individual permit, and "schedules of compliance" are an "effluent limitation" under the Act. Section 502(17), 33 U.S.C. § 1362(17). *See* discussion in note 65 *supra*. This aspect of the process for achieving the Section 301 effluent limitation deadlines is not in issue in this case.

¹⁷⁶ *I.e.*, Sections 301, 304(b), 306, 307(a), (b), (c), 33 U.S.C. §§ 1311, 1314(b), 1316, 1317(a), (b), (c).

¹⁷⁷ Sections 304(h)(2), 402(b)-(k), 33 U.S.C. §§ 1314(h)(2), 1342(b)-(k). *See Leg. Hist.* 727 ("[A] careful reading of the House bill shows that it assigns overriding authority to the Federal Government and direct administrative responsibilities to the States only when, and as, the individual States demonstrate their ability and reliability to live up to that responsibility." (Cong. Robinson)). A similar statement was made by Cong. Gubser. *Leg. Hist.* 664.

¹⁷⁸ *Leg. Hist.* 362.

Congress established a significant number of precise procedural and substantive federal requirements which state Section 402 per-

Amicus American Petroleum Institute contends that EPA's veto power over permits was a basic method adopted by Congress for achieving national, uniform, effluent limitations and quotes with approval the Eighth Circuit's conclusion that "the veto power would make no sense if EPA was already empowered to promulgate regulations under § 301."¹⁷⁹ *Amicus American Petroleum Institute Brief* 41.

It is important to emphasize that the Section 402 veto power was enacted to assist EPA in achieving a number of important statutory objectives in addition to providing EPA with a means of overseeing the application of Section 301 effluent limitations in individual permits. Thus, the veto power is an important tool for ensuring that Section 303 water quality standards are properly applied to dischargers in water quality limited segments, *see* Sections 303 and 301(b)(1)(C), 33 U.S.C. §§ 1313, 1311(b)(1)(C), and for ensuring that in issuing permits the states require full compliance by dischargers with the requirements of the Act such as Sections 302 (water quality effluent limitations), 306 (new source performance standards), 307 (toxic substance standards; pretreatment standards), 308 (monitoring requirements), and 403 (ocean discharge criteria), in addition to Section 301 (effluent limitations).

mit programs and state issued permits must meet. However, exercise of these responsibilities as well as other state permit program responsibilities requires substantial exercise of professional judgment and expertise by state authorities. *See* detailed discussion at pages 20-24 *supra*. States may establish effluent limitation requirements more stringent than the federal requirements, *see* Section 510, 33 U.S.C. § 1370, which would be applied to individual point sources by state permit authorities. In addition, states may establish requirements pursuant to their water quality planning processes, *see* Sections 303(e), 208, 33 U.S.C. §§ 1313(e), 1208. In appropriate cases, these state requirements may be implemented through the state permit program.

¹⁷⁹ *CPC International Inc. v. Train*, 515 F.2d 1032, 1040-41 (8th Cir. 1975).

Amicus American Petroleum Institute's argument—that the veto power would not be meaningful if national, uniform Section 301 effluent limitations were promulgated by regulation—must mean that the Petroleum Institute believes that such promulgation would deprive the permit granting authority of substantially all discretion. This belief is contrary to the facts as demonstrated by the detailed discussion of the extensive responsibilities and actions that state permit authorities must exercise and undertake. *See* pages 20-24, 45-46 *supra*. As a practical matter, the veto power cannot be the principal means for ensuring achievement of nationally uniform effluent limitations because the task would overwhelm EPA: the agency could not individually review and revise, as necessary, the approximately 40,000 industrial permits which are expected to be issued to industrial point sources (nor the approximately 20,000 municipal permits) for the purpose of establishing uniform effluent limitations for similar classes and categories of point sources as required by the Act.¹⁸⁰ Thus, promulgation of national, uniform, minimum Section 301 effluent limitations, not exercise of the veto power over each permit, was the key element of the Congressional scheme for achieving uniform effluent limitation treatment of similar point sources.

III. THE UNITED STATES COURT OF APPEALS HAS EXCLUSIVE JURISDICTION PURSUANT TO SECTION 509 TO REVIEW EPA'S EFFLUENT LIMITATIONS GUIDELINES REGULATIONS

Section 509(b)(1) of the Act provides:

"Review of the Administrator's action (A) in promulgating any standard of performance under section 306, . . . (C) in promulgating any effluent standard, prohibition, or treatment standard under

¹⁸⁰ *See* note 23 and pp. 14-24 *supra*.

section 307, . . . (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306 . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person." 33 U.S.C. § 1369 (b) (1).

The detailed discussion and analysis of the Act's structure and requirements and of EPA's rulemaking actions in issue presented in Sections I and II above (pp. 33-67) demonstrate that these actions are "action[s] . . . promulgating an[] effluent limitation or other limitation under Section 301" Section 509(b) (1) (E), 33 U.S.C. § 1369(b) (1) (E). Accordingly, the U. S. Court of Appeals has exclusive jurisdiction under Section 509 of the Act to review the regulations.

Six of the seven U. S. Courts of Appeals that have considered this issue have held that the U. S. Court of Appeals has exclusive jurisdiction to review the regulations in issue.¹⁸¹ Amicus American Iron and Steel Institute supports EPA's position and presents a detailed argument in support of its conclusion.¹⁸² And Amicus American Petroleum Institute supports U. S. Court of Appeals jurisdiction under Section 509 by stating, *inter alia*, that "whatever else they are, EPA's 'effluent limitations guidelines' constitute an 'action of the Administrator' in 'approving or promulgating' effluent limitations implemented in individual plant permits."¹⁸³ Finally,

¹⁸¹ See cases listed in note 1 *supra*. Only the Eighth Circuit in *CPC International Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975) has held that the U.S. Court of Appeals lacks jurisdiction.

¹⁸² Brief for Amicus Curiae American Iron and Steel Institute 2-3, 5-13.

¹⁸³ Brief for Amicus Curiae American Petroleum Institute 18 & n.18. However, the Institute expresses concern that, *inter alia*, a "ruling by this Court that review jurisdiction lies *exclusively*

EPA provides in its brief a comprehensive and careful analysis of why the U. S. Court of Appeals has exclusive jurisdiction under Section 509 to review the regulations in issue and answers in detail petitioners' arguments to the contrary.

CONCLUSION

Petitioners' contentions are inconsistent with the requirements and objectives of the Act. If adopted, petitioners' interpretation would replace the Act's comprehensive, integrated, carefully coordinated water pollution control program based on applying and enforcing national, uniform Section 301 effluent limitations with a system of essentially *ad hoc*, uncoordinated individualized state effluent limitation setting procedures.

A careful, comprehensive reading of the Act and its legislative history and a detailed consideration of the process required for developing, applying, and enforcing Section 301 effluent limitations make clear that Amicus' and EPA's interpretation of the Act is correct. This interpretation represents a reasonable exercise of the Administrator's authority and is, as well, the interpretation mandated by the Act.

Accordingly, this Court should uphold EPA's actions in promulgating the effluent limitations guidelines regulations in issue as a proper exercise of the Administrator's authority.

Respectfully submitted,

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September 28, 1976

in the courts of appeals might nullify several actions pending in the district courts" *Id.* (emphasis in original) To the extent that this is a problem, the Institute suggests alternative remedies. *Id.*

see

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